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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 492

CIVIL AERONAUTICS BOARD, PETITIONER,

vs.

DELTA AIR LINES, INC.

No. 493

LAKE CENTRAL AIRLINES, INC., PETITIONER,

vs.

DELTA AIR LINES, INC.

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 19, 1960

CERTIORARI GRANTED DECEMBER 12, 1960

SUPREME COURT OF THE UNITED STATES

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**IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

No. 25,422

EASTERN AIR LINES, INC., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, Respondent,

**DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., CAPITAL
AIRLINES, INC., TRANS WORLD AIRLINES, INC., MICHIGAN
DEPARTMENT OF AERONAUTICS, UNITED AIR LINES, INC.,
Intervenors.**

No. 25,434

CAPITOL AIRWAYS, INC., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, Respondent,

**DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., EASTERN
AIR LINES, INC., Intervenors.**

No. 25,439

NATIONAL AIRLINES, INC., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, Respondent,

**DELTA AIR LINES, INC., EASTERN AIR LINES, INC., MICHIGAN
DEPARTMENT OF AERONAUTICS, Intervenors.**

No. 25,532

**CITY OF NASHVILLE AND THE NASHVILLE CHAMBER OF COM-
MERCE, Petitioners,**

vs.

CIVIL AERONAUTICS BOARD, Respondent.

**On Petition for Review of Orders of the Civil Aeronautics
Board**

Joint Appendix

[fols. 1-78] BEFORE THE CIVIL AERONAUTICS BOARD

ORDER No. E-9734—November 10, 1955

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 10th day of November, 1955

Docket No. 2396 et al.

In the matter of

EASTERN AIR LINES, INC., and other applicants for certificates or amendments to certificates of public convenience and necessity, known as the GREAT LAKES-SOUTHEAST SERVICE CASE.

There having been reached for hearing on the Board's Docket the application of Eastern Air Lines, Inc., in Docket No. 2396 which proposes several extensions and modifications of that carrier's routes Nos. 6 and 47 in the general area between Chicago, Ill., Detroit, Mich., and Buffalo, N. Y., on the one hand, and Atlanta, Ga., Jacksonville and Miami, Fla. on the other hand; and

Eastern having also moved that its proposal be heard in four separate but consecutive proceedings which would involve issues limited to particular services Eastern proposes to render in its over-all application; and

Motions having been filed by American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and Piedmont Aviation, Inc., for the dismissal of Eastern's application in Docket No. 2396 or, in the alternative, that the said application be returned to the Board's Docket Section and assigned a new docket number for hearing at a future date; and

The movants having assigned as grounds for their motions, *inter alia*, that Eastern's proposal at the time it was first noted for prehearing conference contemplated service limited for the most part to the Chicago-Washington area whereas Eastern immediately prior to the date of the prehearing conference filed an "Amendment No. 3" to its application which substantially enlarged the scope of

the issues previously present by bringing into issue a number of proposed new non-stop services involving such points as Indianapolis, Ind., Cincinnati, Ohio and Buffalo, N. Y., on the one hand, and Charlotte, N. C., Jacksonville and Miami, Fla., on the other; and

Capital Airlines, Inc., having orally moved for the consolidation of its application in Docket No. 6889 which proposes, among other things, an extension of that carrier's route No. 55 which would involve the question of service to and from points north or west of Chicago, such as Milwaukee and Minneapolis/St. Paul, on the grounds that there should be considered in this proceeding the entire question of new or additional service between all cities in the Great Lakes area and Florida; and

Capital having orally moved for the consolidation of its application in Docket No. 7142, which seeks an extension of that carrier's system operations to Toronto, Canada, on the grounds that inclusion of Toronto would not substantially expand the issues presently involved, and that the [fol. 80] question of service to Toronto is closely related to issues involving service between the Great Lakes area and Florida; and

A number of applications of a local service nature having been filed by Allegheny Airlines, Inc., Lake Central Airlines, Inc., Mohawk Airlines, Inc., North Central Airlines, Inc., Piedmont Aviation, Inc., and Riddle Airlines, Inc., which carriers request the consolidation of their respective proposals in this proceeding on the ground that much of Eastern's application in Docket No. 2396 would involve, in whole or in part, a substantial portion of the services now being rendered or proposed to be rendered by such applicants and which, if not heard in the consolidated proceeding, may well result in substantial diversion of revenues from the above named local service carriers; and

Eastern, as well as practically all of the other trunkline operators, oppose the consolidation of local service applications on the ground that such proposals involve an entirely different type of service from that sought to be rendered by the trunkline carriers; and

A number of additional applications having been filed by other carriers for which consolidation is requested in

whole or in part depending upon the scope of the area to be considered herein; and

Eastern having filed an opposition to the consolidation of any application which proposes new services not comparable to the new services proposed by Eastern; and

The said applicants oppose Eastern's concept of the scope of the proceeding on the ground that no carrier should be permitted to "custom-tailor" a case so that there would be in issue only the identical points involved in the lead [fol. 81] application and the said carriers urge that the issues should include the question of service to all cities within the particular area whether the area be a limited one or whether it be of a broad nature including the question of service between the Great Lakes and the Southeast; and

Motions having been submitted to obviate the issue of through service from points north or west of Chicago by prohibiting through schedules between said points and new cities proposed to be served within the area involved; and

Motions having also been submitted to prohibit a rehearing on proposals involving primarily east-west service between New York and Chicago such as were recently decided in the *New York-Chicago Service Case*, Docket No. 986, *et al.*, Order No. E-9537 (decided September 1, 1955); and

It appearing to the Board, that although Eastern's "Amendment No. 3" did enlarge to some extent the issues present at the time the application was reached on the Board's Docket for hearing the broadening of the proposal merely placed in issue, for the most part, questions relating to whether the public interest required various nonstop services in place of certain one-stop services which were inherent in Eastern's original proposal, and the additional question of service between points now served by Eastern, on the one hand, and Buffalo on the other, which would not justify the dismissal of Eastern's application or the re-assignment to it of a later docket number; and

It further appearing to the Board, after giving full consideration to the arguments advanced by the various

[fol. 82] parties, that certain applications proposing additional air transportation service in a broad area between the Great Lakes and the Southeast bounded by the cities of Chicago, Ill., Detroit, Mich., and Buffalo, N. Y., on the north and Indianapolis, Ind., Louisville, Ky., and Atlanta, Ga., on the west, Washington, D. C., and Baltimore Md. on the east and Tampa and Miami, Fla. on the south, can be advantageously and expeditiously determined in a single consolidated proceeding without any adverse effect upon the public interest and without prejudice to such further procedures with respect to each application as may be found necessary and appropriate; and

It further appearing that Eastern's suggestion with respect to divorcing its proposal into four parts for separate consecutive hearings thereon would not be feasible or practical in a consolidated proceeding involving a number of applications proposing similar but not identical services such as are proposed by Eastern; and

It further appearing that requests for the consolidation of applications involving service between cities in the above stated area, on the one hand, and Milwaukee and Minneapolis/St. Paul on the other, would unduly broaden the issues involved in the case; and

It further appearing that under the Board's generally established policy there should not be consolidated herein proposals contemplating service to foreign points such as Toronto, Canada; and

It further appearing that the consolidation of applications of a local service nature would not be in accord with the Board's policy of not co-mingling such proposals in a [fol. 83] proceeding predominantly involving long-haul services and that the interests of any local service carrier, which might possibly be adversely effected may be adequately protected by granting such carrier leave to intervene and, in any event the parties will be entitled, as in all proceedings where there exists overlapping applications, to urge the mutual exclusivity of their respective proposals; and

It further appearing that in view of the large number of applications involving local service within the section of

the country generally known as the Great Lakes area the Board will direct that a hearing involving such proposals be set down promptly; and

It further appearing that the consolidation of issues involving nonstop service between cities outside of the area to be considered herein, on the one hand, and new cities proposed to be served within the area, on the other hand, would unduly broaden the case and render it unmanageable from a procedural standpoint; hence, any new authorizations resulting from the proceeding will carry a restriction prohibiting such nonstop service; and

It further appearing that the entire question of new or additional service, primarily of an east-west nature between New York and Chicago, was the subject of extensive hearings in the *New York-Chicago Service Case*, *supra*, decision on which was only recently reached by the Board, and that it would not be appropriate procedure or in the public interest to again take evidence at this time with respect to such proposals;

[fol. 84] It is Ordered:

1. That the motions of American, Delta, Northwest and Piedmont to dismiss Eastern's application in Docket No. 2396 or in the alternative to return said application to the Board's Docket Section for future hearing at a later date be denied;

2. That there be consolidated for hearing with Eastern's application in Docket No. 2396 all pending proposals involving service in the area extending from Chicago, Ill., Detroit, Mich., and Buffalo, N. Y., on the north, Indianapolis, Ind., Louisville, Ky., and Atlanta Ga., on the west, Washington, D. C. and Baltimore, Md., on the east and Miami and Tampa, Fla., on the south;

3. That the Chief Examiner set down for prompt hearing a proceeding involving local service applications in the general section known as Great Lakes area;

4. That the proposals of Capital Airlines, Inc., in Docket No. 6889, except the following portions thereof:

(a) extension of route No. 55 from Atlanta, Ga. to Miami, Fla., via Jacksonville, Tampa, and West Palm Beach, Fla.,

(b) extension of route No. 55 from Pittsburgh, Pa. to Detroit, Mich., via Youngstown, Akron, Cleveland, and Toledo, Ohio;

(c) extension of route No. 55 from Pittsburgh, Pa. to Buffalo, N. Y., via Erie, Pa.,

(d) a new segment of route No. 14 beyond Pittsburgh, Pa. to Chicago, Ill., via Charleston, W. Va., Cincinnati, Ohio, and Indianapolis, Ind.,

[fol. 85] (e) a new segment of route No. 14 beyond Pittsburgh, Pa. to Chicago, Ill., via Columbus, Dayton, Ohio; Fort Wayne and South Bend, Ind. be severed and assigned Docket No. 7493.

5. That the application of Delta Air Lines, Inc., in Docket No. 6995, except the following parts thereof which seeks, subject to a restriction prohibiting service to both Cleveland, Ohio, and Pittsburgh, Pa. on the same flight:

(a) amendment of route No. 8 from the present intermediate point Indianapolis, Ind., via Cincinnati, Dayton, and Columbus, Ohio; Pittsburgh, Pa., Youngstown and Cleveland, Ohio, Erie, Pa., to Buffalo, N. Y., and

(b) amendment of route No. 54 by the addition of Louisville, Ky. as an intermediate point between Lexington, Ky., and Cincinnati, Ohio; and the addition of Indianapolis, Ind. as an intermediate point between Cincinnati, Ohio, and Chicago, Ill.; and

(c) amendment of Route No. 54 so as to extend said route from the present intermediate point Cincinnati, Ohio, to Detroit, Mich., via Columbus and Cleveland, Ohio, be severed and assigned Docket No. 7494.

6. That the proposals of Delta Air Lines, Inc., in Docket No. 7224, as follows:

(a) that portion which proposes service beyond Detroit, Mich., Milwaukee, Wis., Rochester, Minn. and the terminal point Minneapolis/St. Paul, Minn.

(b) that portion which proposes service beyond Detroit, Mich., Milwaukee, Wis., Rochester, Minn. and the terminal point Minneapolis/St. Paul, Minn. and

[fol. 86] (c) that portion which proposes service beyond Detroit, Mich., Milwaukee, Wis., Rochester, Minn. and the

terminal point Minneapolis/St. Paul, Minn. be severed and assigned Docket No. 7495.

7. That the proposals of Delta Air Lines, Inc., in Docket No. 7225, as follows:

(a) inclusion of Birmingham as an intermediate point between Atlanta, Ga. and Chattanooga, Tenn. and

(b) inclusion of Nashville as an intermediate point between Knoxville and Lexington be severed and assigned Docket No. 7496.

8. That the proposals of Delta Air Lines, Inc., in Docket No. 7270, except that portion which seeks a new segment of route No. 54 as follows: beyond the intermediate point Cincinnati, Ohio, via Dayton, Columbus, Ohio, Pittsburgh, Pa., Youngstown, Cleveland, Ohio, Erie, Pa. to Buffalo, N. Y. be severed and assigned Docket No. 7497.

9. That the proposals of Delta Air Lines, Inc., in Docket No. 7271, except that portion which seeks an amendment of route No. 54 so as to provide service beyond Atlanta, Ga. to Detroit, Mich., via Pittsburgh, Pa. and Cleveland, Ohio, be severed and assigned Docket No. 7498.

10. That the proposals of Eastern Air Lines, Inc., in Docket No. 7286, except that portion thereof which seeks an amendment of route No. 10 by adding a new segment from the intermediate point Louisville, Ky. to the terminal point Buffalo, N. Y., via Cincinnati, Dayton, Columbus, and Toledo, Ohio, and Detroit, Mich., be severed and assigned Docket No. 7499.

[fol. 87] 11. That those portions of the application of Eastern Air Lines, Inc., in Docket No. 7287 which seeks an amendment of route No. 10 so as to provide service:

(a) beyond Pittsburgh, Pa. to New York, N. Y./Newark, N. J., and

(b) between Detroit, Mich., Milwaukee, Wis., and Minneapolis/St. Paul, Minn. be severed and assigned Docket No. 7500.

12. That that portion of the application of Eastern Air Lines, Inc., in Docket No. 7288, which seeks a new certificate or amendment of one or more existing certificates so as to provide service between New York, N. Y./Newark, N. J.,

and Pittsburgh, Pa., be severed and assigned Docket No. 7501.

13. That those portions of the application of Eastern Air Lines, Inc., in Docket No. 7289, which seek a new certificate or amendment of one or more existing certificates so as to authorize service between:

(a) New Orleans, La. and Louisville, Ky., via Jackson, Miss., Memphis and Nashville, Tenn., and Evansville, Ind., and

(b) Houston, Tex. and Louisville, Ky., via Beaumont-Port Arthur, Tex., Shreveport, La., Little Rock, Ark., Memphis and Nashville, Tenn., and Evansville, Ind., be severed and assigned Docket No. 7502.

14. That those portions of the application of Eastern Air Lines, Inc., in Docket No. 7290, which seek a new certificate or amendment of one or more existing certificates so as to authorize service between,

[fol. 88] (a) Atlanta Ga. and Lexington/Frankfort, Ky., via Birmingham, Ala., Chattanooga, Knoxville, and Nashville, Tenn., and

(b) Spartanburg, S. C., and Lexington/Frankfort, Ky., via Knoxville and Nashville, Tenn., and

(c) Detroit, Mich. and Minneapolis/St. Paul, Minn., via Milwaukee, Wis. and Rochester, Minn., be severed and assigned Docket No. 7503.

15. That that portion of the application of Eastern Air Lines, Inc., in Docket No. 7291, which seeks an amendment of route No. 10 so as to add a new segment extending from Birmingham, Ala. to San Antonio, Tex., via Montgomery and Mobile, Ala., New Orleans, La., and Houston, Tex., be severed and assigned Docket No. 7504.

16. That that portion of the application of Eastern Air Lines, Inc., in Docket No. 7292, which seeks an amendment of route No. 6 so as to provide service between Chicago, Ill. and Seattle, Wash., via Milwaukee and Madison, Wisconsin, Rochester and Minneapolis/St. Paul, Minn., Billings, Mont., Spokane, Wash., and Portland, Ore., be severed and assigned Docket No. 7505.

17. That that portion of the application of National Air-

lines, Inc., in Docket No. 7296, which seeks an amendment of route No. 31 so as to provide service between:

(a) Chicago, Ill., and Minneapolis/St. Paul, Minn., via Milwaukee, Wis., and

(b) Detroit, Mich., and Minneapolis/St. Paul, Minn., via Milwaukee, Wis., be severed and assigned Docket No. 7506. [fol. 89] 18. That that portion of the application of National Airlines, Inc., in Docket No. 7297, which seeks authority to operate service between Buffalo, N. Y. and Toronto, Ontario, Can. be severed and assigned Docket No. 7507.

19. That that portion of the application of North American Airlines, Inc., in Docket No. 7264, which seeks to provide service between Louisville, Ky., and St. Louis, Mo. be severed and assigned Docket No. 7508.

20. That that portion of the application of Northwest Airlines, Inc., in Docket No. 7241, which seeks to provide service between Pittsburgh, Pa., and New York, N. Y./Newark, N. J., be severed and assigned Docket No. 7509.

21. That the following applications be and they are hereby consolidated in the one proceeding and assigned for hearing at a time and place to be hereafter designated before an examiner of the Board: Eastern Air Lines, Inc., Docket Nos. 2396, 7286, 7287, 7288, 7289, 7290, 7291, and 7292; American Airlines, Inc., Docket No. 6827; Capital Airlines, Inc., Docket Nos. 6889 and 7266; Delta Air Lines, Inc., Docket Nos. 6995, 7223, 7224, 7225, 7270, 7271, and 7298; National Airlines, Inc., Docket Nos. 6994, 7296 and 7297; North American Airlines, Inc., Docket Nos. 6063 and 7264; Northwest Airlines, Inc., Docket Nos. 6118, 7210, 7211, 7239, 7241 and 7242; Riddle Airlines, Inc., Docket No. 7258; Trans World Airlines, Inc., Docket Nos. 7209 and 7268; United Air Lines, Inc., Docket Nos. 7220, 7221, 7222, and 7269.

22. That any new authorizations issued as a result of this proceeding shall prohibit the operation of nonstop [fols. 90-1312] service between points outside of the area and new points to be served within the area specifically designated herein.

23. That any applicants desiring consolidation of applications, or portions thereof, which are presently on file

or which may be filed shall make such request by motion not later than ten days from the date hereof.

24. That except to the extent granted herein all motions with respect to the proceeding are hereby denied.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan, Secretary. [Seal.]

[fol. 1313] BEFORE THE CIVIL AERONAUTICS BOARD

BOARD'S DECISION AND ORDERS E-13024—September 30, 1958

GREAT LAKES-SOUTHEAST SERVICE CASE

Docket No. 2396 et al.

Decided: September 30, 1958

Northwest Airlines' route No. 3 extended from Chicago to Miami via Atlanta and Tampa-St. Petersburg-Clearwater, subject to restriction prohibiting turnaround service on segment between Atlanta and Florida.

Past high load factors, difficulties in obtaining space and the size and potential of the Chicago-Miami market indicate that authorization of a third carrier is required by the public convenience and necessity. Competitive service between Tampa and Chicago is required, and addition of Atlanta will add support to the route. Indianapolis and Louisville added to Delta's route No. 54 rather than to new Chicago-Miami route so as to provide greater improvements in service and to even out the competitive relationship between Delta and Eastern in the Great Lakes-Southeast markets. Also, found that Tampa-St. Petersburg-Clearwater, Orlando and West Palm Beach should be added to Delta's route No. 54. Knoxville, Jacksonville and Tallahassee not included on Chicago-Miami route, since no need found for additional competitive service to these points.

The traveling public will be benefitted by authorization of a competitive Chicago-Miami carrier without adverse [fol. 1314] effect on presently authorized carriers. Lower

load factors of authorized carriers in a market do not, *per se*, bar authorization of a competitive carrier and needed route extensions should not be denied merely because carriers are in a period of depressed earnings. Delta and Eastern motions to reopen record on these grounds denied.

Northwest selected over National or other carriers to operate Chicago-Miami route because it can provide most public benefits. Northwest can provide greater beyond-terminal benefits and the route will integrate well seasonally with Northwest's present system. Northwest also has an important historic interest in the traffic over the route. National's need for route strengthening and other arguments favoring its selection are out-weighed by these factors in favor of selection of Northwest. Applications of TWA and United denied because the beyond-terminal traffic benefits they could provide are offered by the TWA St. Louis-Southeast extension in the *St. Louis-Southeast Service Case*. Also by selecting Northwest, one of the smaller trunks is strengthened. Capitol Airways coach proposal between Chicago/Detroit-Miami denied because need found for both coach and first-class services. Northwest and Delta found better qualified to provide needed competitive service. An experimental authorization of Capitol Airways in addition to Northwest and Delta would adversely affect the other new route authorizations granted.

Delta Air Lines' route No. 54 extended from Cincinnati to Detroit via Dayton, Columbus and Toledo, subject to long-haul restrictions. Extension of Delta's route will [fol. 1315] provide needed competitive service between Detroit area and Florida.

Capital Airlines' route No. 51 extended from Pittsburgh to Buffalo via Youngstown, Akron-Canton, Cleveland and Erie, and from Atlanta to Miami via Jacksonville, Tampa-St. Petersburg-Clearwater and West Palm Beach, subject to long-haul and turnaround restrictions. Capital route will provide required single-carrier service between Buffalo and Miami and new competitive service between Cleveland and Pittsburgh and Florida. Capital selected over National or other carriers because of greater historic interest in traffic over the route, greater beyond-terminal benefits and serious adverse impact on Capital of selecting another carrier. Capital's fitness for new route award not successfully chal-

lenged. Capital's financial position is improving and the carrier has markedly increased operations in recent periods. As a trunk carrier operating a major route system, there can be little question of its legal fitness to receive a new route award.

Eastern Air Lines' route No. 6 extended from Charleston, W. Va., to Chicago via Cincinnati, subject to long-haul restriction, and Raleigh-Durham added as intermediate point on Chicago and Detroit leg of route No. 6, subject to long-haul restriction. New route will offer direct Chicago service to Carolina area cities and provide Cincinnati with competitive service to the Southeast. Long-haul restrictions imposed to minimize diversion from Piedmont Aviation in intermediate markets. No need found to authorize Eastern route No. 10 extension from Louisville to Detroit. Needs of cities on proposed extension adequately provided for by other authorizations herein.

[fol. 1316] Charleston, S. C.-Savannah gap in Delta's route No. 54 closed. Extension will permit service to both points on the same flight and will result in an improvement of service to Charleston, S. C.

Presently authorized Chicago-Washington services found ample; therefore, no need found for new routes or for removal of long-haul restrictions on TWA and United Chicago-Washington nonstop flights.

United Air Lines' route No. 1 amended by adding a new segment between Chicago, Columbus, Dayton, Washington and Baltimore, subject to long-haul restrictions. The new segment provides needed competitive service for Columbus and Dayton. Selection of United to provide the service will give the Ohio cities important beyond-terminal single-carrier benefits.

Trans World Airlines' route No. 2 amended by eliminating prohibition against Indianapolis-Cincinnati nonstop service, but made subject to long-haul restriction. Removal of restriction will promote schedule flexibility.

Northwest Airlines' route No. 3 restrictions amended to permit unrestricted operations between Detroit, Cleveland, Pittsburgh, Washington and Baltimore. Baltimore added as a terminal point on the route. Removal of present restrictions will permit needed improvements in serv-

ice to the cities involved, without adverse competitive impact on Capital.

All new authorizations granted subject to restrictions necessary to protect local service carriers in local markets and to insure provision of long-haul services by the newly authorized trunk carriers.

[fol. 1317] APPEARANCES:

~~Same as in the Initial Decision~~, and in addition the following:

Lawrence L. Stentzel for Allegheny Airlines, Inc.

Charles R. Cutler for Mohawk Airlines, Inc.

R. J. Shortlidge, Jr. for Southern Airways, Inc.

Hugh Davison for the Bradenton, Fla., Chamber of Commerce.

Carl G. Maundrell for the Buffalo, N.-Y. Chamber of Commerce.

R. O. Horn for the City and Chamber of Commerce of Cleveland, Ohio.

Francis Bolton for the City of Columbus, Ohio.

George Kiba for the Greater Detroit, Michigan Board of Commerce.

Harry Gonzales for the Jacksonville, Fla. Chamber of Commerce.

Allen J. Robertson for the Lee County, Fla. Chamber of Commerce.

C. Ray Smith for Pinellas County and the St. Petersburg and Clearwater, Fla. Chamber of Commerce.

William F. Chase for the Pittsburgh, Pa. Chamber of Commerce.

Todd Swalm and Fred MacDonald for the Sarasota, Fla. Chamber of Commerce.

Gregory T. Marquez for the West Palm Beach, Fla. Chamber of Commerce.

[fol. 1318] James D. Ramsey and Robert G. Howlett for the Michigan Department of Aeronautics.

Max M. Kampelman for the Minnesota Department of Aeronautics.

Henry Loble for the Montana Aeronautics Commission.

Harold G. Vavra for the North Dakota Aeronautics Commission.

D. L. Landsen for the Tennessee Aeronautics Commission.

Edward F. McKee for the West Virginia State Aeronautics Commission, and with William F. Keefer for the County of Ohio Board of Commissioners and the Ohio Valley Board of Trade, Inc.

John H. Bowers for the State of Wisconsin and the Milwaukee Association of Commerce.

OPINION

By the Board:

This consolidated proceeding involves proposals for new air service within the general areas between Florida, on the one hand, and Chicago, Detroit and Buffalo, on the other hand, and between Chicago and Washington, D. C. After due notice, a public hearing was held before Examiner William F. Cusick, who has issued an extensive Initial Decision. Exceptions to the Initial Decision and briefs to the Board have been filed. The Board has heard oral argument and the case stands submitted for decision.

Upon consideration of the entire record, we find that we are in agreement to a large extent with the Examiner's [fol. 1319] conclusions. Thus, we are in agreement with the following route modifications recommended by the Examiner: (a) extension of route No. 54 of Delta Air Lines, Inc. (Delta), from Cincinnati to Detroit via Dayton, Columbus, and Toledo¹ and the addition of Tampa-St. Petersburg-Clearwater and Orlando as intermediate points on route No. 54 between Miami and Jacksonville; (b) extension

¹ The Examiner recommended a restriction prohibiting turnaround service between Cincinnati and Detroit.

of route No. 51 of Capital Airlines, Inc. (Capital), from Pittsburgh to Buffalo via Youngstown, Akron-Canton, Cleveland and Erie and the extension of route No. 51 from Atlanta to Miami via Jacksonville, Tampa-St. Petersburg-Clearwater and West Palm Beach;² (c) extension of route No. 6 of Eastern Air Lines, Inc. (Eastern), from Charleston, W. Va., to Chicago via Cincinnati;³ (d) extension of Delta's route No. 54 between Savannah and Charleston, S. C.; (e) amendment of route No. 1 of United Air Lines, Inc. (United) to authorize service between Chicago and Washington via Dayton and Columbus; (f) elimination of the restriction prohibiting nonstop service between Cincinnati and Indianapolis on TWA's route No. 2 and (g) authorization of unrestricted operations between Detroit, Cleveland, Pittsburgh and the co-terminals Washington and Baltimore on route No. 3 of Northwest Airlines, Inc. (Northwest).

[fol. 4320] We are not following certain of the other route modifications recommended by the Examiner. He recommended certification of National Airlines, Inc. (National), to operate between Chicago and Miami via Indianapolis, Louisville, Knoxville, Atlanta, Tallahassee, and Tampa-St. Petersburg-Clearwater. We believe a somewhat different route pattern in this area is required. We will extend Northwest's route No. 3 from Chicago to Miami via Atlanta and Tampa-St. Petersburg-Clearwater and will add Indianapolis and Louisville as intermediate points on Delta's route No. 54. Also, we do not believe the recommended extension of Eastern's route No. 10 from Louisville to Detroit via Cincinnati and Fort Wayne, or the removal of the long-haul restrictions on the Chicago-Washington services of TWA and United are required. We are also

² The Examiner recommended restrictions prohibiting operations between Erie and Cleveland except on flights serving Atlanta or Miami, turnaround service between Atlanta and Miami, and single-plane service between points on route No. 51 between Atlanta and Washington/Baltimore, on the one hand, and the new Florida points, on the other.

³ The Examiner recommended a restriction requiring flights serving Charleston, W. Va., and Chicago to originate or terminate at Columbia, S. C., or a point south thereof.

imposing certain restrictions on the new authorizations in addition to those recommended by the Examiner. Accordingly, except as modified herein, we adopt as our own the findings and conclusions of the Examiner in his Initial Decision which is attached hereto as an Appendix.

I

Turning first to the Chicago-Miami market, we fully agree with the Examiner's conclusion* that authorization of a third carrier is required. The shortcomings of the existing services, as detailed by the Examiner, underscore the service improvements that can be anticipated from adding another carrier to the route. We are convinced that the traffic is sufficiently large now and has the inherent potential to support another carrier in addition to Delta and Eastern. The Chicago-Miami market is by [fol. 1321] far the largest two carrier market in the country¹ and has shown an impressive continuing growth:

Chicago-Miami Passengers²

1953	1954	1955	1956	1957
180,817	205,335	283,452	304,837	313,001

¹ Top one- and two-carrier markets as shown in the September 1956 and March 1957 *Competition Among Domestic Air Carriers* reports are as follows:

City Pair	Number of Passengers	Number of Passenger Miles (000)	Number of Carriers
Chicago-Miami	29,457	34,936	2
San Francisco-Seattle	13,300	9,137	2
Dallas-New Orleans	13,319	5,820	2
Dallas-Los Angeles	12,560	15,637	1

The Chicago-Miami market is also larger than other major long-haul Chicago markets served by three or more carriers:

City Pair	Number of Passengers	Number of Passenger Miles (000)
Chicago-Los Angeles	24,180	42,340
-Washington	20,413	12,248
-San Francisco	16,867	31,306
-Philadelphia	12,708	8,527

² March and September O&D Surveys $\times 13$.

The indications in the record of the marked increase in the population of Miami, the continuing development of Florida as a vacation center, and the many new industries settling in Florida, all point to an increasing future demand for Chicago-Miami service.

The size and growth in traffic between Chicago and Atlanta and Tampa-St. Petersburg-Clearwater also indicates that these points should logically be included as intermediates on the new route. In particular, Tampa/St. Petersburg-Chicago is among the largest monopoly markets in the country, and clearly warrants the development [fol. 1322] mental benefits of competitive service. Tampa-St. Petersburg's recent traffic growth is as follows:

Tampa/St. Petersburg-Chicago Passengers.⁶

1953	1954	1955	1956	1957
31,629	45,565	56,264	72,215	74,464

The population of the Tampa-St. Petersburg area has increased over 60% since 1945 and business and industrial activity has shown marked growth. And the Tampa-St. Petersburg area is second only to Miami in number of tourists attracted to Florida. We fully agree with the Examiner's finding of a need for competitive Tampa/St. Petersburg-Chicago service.

We also believe Atlanta should be included on the Chicago-Miami route. The market involved is substantial:

Atlanta-Chicago Passengers⁷

1953	1954	1955	1956	1957
37,323	39,130	46,956	50,466	52,767

A market of the size of the Chicago-Atlanta traffic with a demonstrated trend of growth can, in our opinion, support the services of an additional competitive carrier. Although there does not appear to be a substantial need for added Atlanta-Florida service, the size of the Chicago-Atlanta market and the important support Atlanta will add to the Chicago-Miami route warrant Atlanta's inclusion as an intermediate point on the new route.

[fol. 1323] As noted above, the Examiner would include

⁶ March and September O&D Surveys × 13.

⁷ March and September O&D Surveys × 13.

Indianapolis and Louisville on his proposed new Chicago-Miami route. We agree that Indianapolis and Louisville require competitive service to the Southeast, but believe they should be added to Delta's route No. 54 rather than to the new Chicago-Miami route. Delta is already Eastern's primary competitor in the Great Lakes-Southeast area, and our action in adding Louisville and Indianapolis to Delta's route will merely extend that relationship to two additional points within Delta's general area of operations.

The addition of Indianapolis and Louisville to route No. 54 integrates well with Delta's present services. Delta now serves Indianapolis on its Detroit-New Orleans route No. 8. It will now be able to expand and develop the various services it can provide to Indianapolis from points on both routes Nos. 8 and 54. And as to Louisville, by adding the point to Delta's route, we can satisfy its needs for competitive service to Florida and the Southeast and its needs for competitive service to Detroit via the Cincinnati-Detroit extension of route No. 54. Thus, by including Louisville on Delta's route rather than on the new Chicago-Miami route, we are providing the city with more of the improved services it seeks by a carrier identified with and already operating in the area.

As part of our efforts to make Delta and Eastern more fully competitive in the major markets in the Chicago-Detroit-Miami area, we are also adding Tampa-St. Petersburg-Clearwater to Delta's route. As indicated above, Chicago-Tampa is one of the largest monopoly markets in the country, and can, in our opinion, support multi-carrier service. This addition will also afford first competition [fol. 1324] petitive service in the Detroit-Tampa market. We believe all the various carrier routes to Florida must include Tampa, which is next to Miami in importance as a vacation spot.⁸ With the over-all development of Florida

⁸ The issue of adding Tampa as an intermediate point on Delta's route No. 54 was deferred in the *New York-Florida Case*, Docket No. 3051 et al., Order No. E-10884, December 21, 1956, for contemporaneous consideration with the Tampa-Great Lakes applications heard in the present proceeding. Since Tampa is being added to route No. 54 herein, the *New York-Florida Case* may now be terminated.

travel, we are satisfied that such a full pattern of competitive service is justified.⁹

We disagree with the Examiner's conclusion that Jacksonville should be included on the new Chicago-Miami route. Jacksonville's traffic from the Great Lakes area cities is considerably less than that generated to the vacation spots of Tampa and Miami, and is adequately served at present by Delta and Eastern. Since the point is more of a business center than a vacation spot, we do not believe third carrier competition is required to meet its air service needs.¹⁰

[fol. 1325] Nor do we believe Knoxville's traffic to Chicago and Florida warrants authorization of competitive service at the present time. In 1957, Knoxville generated only about 32 passengers a day to Chicago and about 12 passengers a day to Florida. Our action herein does, however, make valuable new services available to Knoxville over Delta's route No. 54 to Detroit, Indianapolis, Louisville and Tampa. Knoxville will now have a single-carrier service to these important cities. We note that Delta's services at Knoxville leave much to be desired in the way of limited-stop service with large aircraft to certain of the major

⁹ We are also adding West Palm Beach as an intermediate point on Delta's route No. 54 to complement the carrier's pattern of service to the major Florida vacation spots. Although West Palm Beach is not as important a traffic point as Miami or Tampa, the authorization of a stop at West Palm Beach will convenience a significant number of passengers (over 11,000 passengers moved between West Palm Beach and Chicago-Detroit in 1957), and will afford competitive service to such points as Chicago, Detroit, Cincinnati and Louisville, points which are or will be served by Eastern. We believe the traffic growth which may be expected to accompany West Palm Beach's continuing development as a tourist, business and light manufacturing center fully warrants competitive service to the Great Lakes cities made possible by its addition to Delta's route.

¹⁰ We are, however, adding Jacksonville to the Capital route No. 51 extension so as to provide first one-carrier service to Buffalo and first competitive service for such important points as Cleveland and Pittsburgh.

cities on route No. 54. With the traffic support of other new cities on its system, Delta will be expected to remedy this situation on its own initiative to the extent that Knoxville's traffic showing is a reflection of the limited service available to it.

We also find that Tallahassee's traffic does not warrant its inclusion on the new direct Chicago-Florida route. The point generated only 5 passengers per day to Chicago in 1957, and adequate service for this traffic is available through the Atlanta gateway. Both National and Eastern serve Tallahassee to other Florida points. We conclude that an additional authorization at Tallahassee is not required.

In the light of the foregoing, we will authorize a third Chicago-Miami route with only Atlanta and Tampa-St. Petersburg-Clearwater as intermediate points. The new route involves one of the major long-haul flows of traffic in the country. Traffic between the points on the new route and Chicago alone amounted to over 440,000 passengers in 1957. With the demonstrated need for new service over this route, as detailed by the Examiner, and with [fol. 1326] a market of this volume, we have little doubt but that the third carrier can provide the needed services on an economic basis. The markets involved have been demonstrated as growing every year and, with the spur of competitive service, that growth, which reflects the expanding Florida economy, can be expected to continue.

Delta and Eastern have pointed out the sizeable revenues they derive from the markets which will be served by the new route, and express their concern over diversion if a third carrier is authorized. Delta estimates the third carrier would actually divert over \$2.85 million based on its 1956 revenues from Chicago-Atlanta-Miami traffic. Adjusting Eastern's own diversion estimate to conform to the Chicago-Miami route we are authorizing, produces an Eastern estimate of \$7.4 million in diversion. The carriers cite this estimated diversion as an important reason for not certificating a third Chicago-Miami carrier.

We have consistently given full consideration to possible diversion from carriers authorized to serve a particular market before granting competitive applications, and have considered the probable diversion from Delta and Eastern

to result from authorization of a third Chicago-Miami carrier. However, we have concluded that the route is rich enough to support three carriers. The diversionary impact on an existing carrier must seriously affect its financial position before it could justify withholding authorization of needed competitive service, and Delta and Eastern have not shown they would suffer such an effect. The arguments that their revenues will be reduced and their declining earnings position aggravated do not persuade us to alter our decision. Eastern has been able to maintain a good earnings position despite the certification [fol. 1327] of major competitive routes; and any traffic diversion which Delta may suffer is offset by the important new sources of traffic opened up to it by our decision herein. Eastern is also receiving the important extension of route No. 6 to Cincinnati and Chicago.

Moreover, on its face Eastern's diversion estimate is substantially overstated, since it assumes that the third carrier would carry one-third of the traffic over the route. This participation factor is unrealistic in the face of Eastern's identity and entrenched position of the Chicago-Miami route markets. The fact that Eastern carries well over 50% of the Chicago-Miami traffic in competition with Delta supports this conclusion. We believe Northwest cannot be expected for some time to achieve more than a 20% participation. Cf. *Southwest-Northeast Service Case*.¹¹ Although some of the carriers' Chicago-Florida traffic will be diverted, we are convinced the growth in the Florida traffic market will substantially offset the traffic diverted to Northwest. We are unable to conclude that the award of the new route will so adversely affect Eastern as to justify denying the traveling public the benefits to be derived from the third carrier's Chicago-Florida service.

We turn next to the matter of selection of carrier. We believe the public interest will be best served by selecting Northwest to operate the new route which we have found required. In his Initial Decision, the Examiner selected National to serve the new Chicago-Florida route he recommended. He narrowed the choice of carriers to National and Northwest, and in making his choice relied heavily

¹¹ Order E-9758, Nov. 21, 1955.

on National's "need for strengthening". We agree with the Examiner that the choice to be made is basically between [fol. 1328] National and Northwest; but we select Northwest because of the greater public benefits that it can offer.

Since neither Northwest nor National ranks among the stronger trunk carriers, our policy which has favored strengthening the systems of smaller trunks to provide required new services, is a factor which both applicants can claim in their favor. We agree with the Examiner that National's route system could well be strengthened, but the same is equally true of Northwest. Likewise, we are convinced that either National or Northwest could adequately service the Chicago-Miami route. However, Northwest has an important advantage in its favor in that it could provide important additional single-plane and single-carrier services which National could not provide. National would be forced to rely on the traffic generated over the new segment alone in support of its operations,¹² whereas Northwest will have the benefit of beyond-Chicago traffic support from such points as Milwaukee, Twin Cities and Seattle. According to the 1957 Surveys, over 49,000 annual passengers moved between Miami and points on Northwest's system beyond Chicago. For the same period, there were over 15,600 Tampa-St. Petersburg and over 12,500 Atlanta passengers to points beyond Chicago on Northwest's system.¹³ And Northwest

¹² Little additional strength would be added by awarding the route as an extension of National's route No. 31 to the north from Jacksonville. Only the relatively limited traffic from the smaller cities National now serves in Florida such as Daytona Beach, Ft. Myers, and Sarasota, would be involved.

¹³ The fact that issues involving direct nonstop service between Florida and southeastern points, on the one hand, and Milwaukee and the Twin Cities, on the other, are presented in the *Chicago-Milwaukee-Twin Cities Case*, Docket No. 3207 *et al.*, does not preclude our consideration of the beyond-segment benefits Northwest could provide if awarded a Chicago-Miami route. Looking only at traffic west of the Twin Cities, the extension of Northwest

[fol. 1329] has proposed single-plane service for all but an insignificant portion of this 77,000 passenger total. By the selection of Northwest, these passengers will be afforded the benefits of single-carrier and single-plane service. Northwest has proposed one-plane service to Miami from such points as Milwaukee, Madison, Rochester, Twin Cities, Fargo, Grand Forks, Winnipeg, Great Falls, Billings, Spokane, Portland and Seattle. Twenty-one domestic cities west of Chicago would receive new one-carrier service to Miami. Northwest has operated a Miami interchange with Eastern from the Twin Cities; but all the other cities north of Chicago will be receiving their first single-carrier service. And as we have had occasion to note in other cases, single-carrier service is superior to interchange service in a number of respects, especially greater flexibility in scheduling and in adding additional flights. No comparable advantage to the traveling public would result from the selection of National.¹⁴

Another consideration pointing to Northwest's selection is the seasonal integration of the new Florida route with Northwest's present system. The winter months are peak Florida travel months, whereas Northwest suffers a marked wintertime slump in traffic over its present northerly east-west route system. Thus, with less additional over-all capital commitment than would be required of National, [fol. 1330] Northwest will be able to divert its aircraft from its northerly east-west operations to the Florida run, since the winter increase in Florida traffic complements a decline in its wintertime east-west traffic. If National were selected to operate the route, its present high degree of seasonality over the east coast New York-Miami route

would have inconvenienced almost 14,000 passengers to Miami, Tampa-St. Petersburg and Atlanta in 1957. National could provide no comparable beyond-segment benefits.

¹⁴ Also, Northwest has a greater historic interest in the traffic which will move over the new route than does National. Northwest has sold a substantial volume of Florida travel from its various system points for movement through Chicago and has operated a Twin Cities-Miami interchange service with Eastern since 1954.

would be further aggravated by a coincident peaking of the Chicago-Miami traffic.

We agree with the Examiner that Northwest's claims for selection are also superior to those of TWA and United; however, we do not fully agree with the basis on which he denied their applications. The Examiner concluded that the beyond area traffic benefits which TWA and United could provide for West Coast traffic to Florida were outweighed by the adverse effect the selection of TWA or United would have on the presently operated interchanges between Florida and Atlanta on the West Coast. However, we have previously noted the superiority of single-carrier, single-plane service to interchange service, and we therefore do not regard protection of an interchange as an imperative consideration in either the certification of a needed new route or selection of carrier to prove needed new services. We have considered the beyond area benefits claimed by TWA and United and have selected TWA to provide a St. Louis-Florida service in the *St. Louis-Southeast Service Case*, decided concurrently herewith, in part because of these beyond area benefits.¹⁵ Grant of the St. Louis-Miami route to TWA disposes of this factor as an important consideration in [fol. 1331] the present case. Furthermore, as between Northwest and the two Big Four applicants—TWA and United, Northwest is to be favored because of the strength the route will add to its system.

Capitol Airways has proposed a novel 4 cents per mile fare coach service between Chicago and Miami and Detroit and Miami.¹⁶ We have considerable doubt that Capi-

¹⁵ We agree with the Examiner that the circuitry of a TWA or United service from their West Coast cities to Florida via a required stop at Chicago would detract from the quality of the through service they could provide.

¹⁶ Capitol proposes Chicago-Miami service via Indianapolis, Louisville, Chattanooga, Atlanta and Tampa-St. Petersburg. The carrier proposes a Detroit-Miami route via Toledo, Cleveland, Dayton, Cincinnati, Louisville and the other intermediate points to the south as named on the Chicago-Miami route.

tol could economically provide a coach service of the type it proposes; but in any event, we believe that the factors pointing to the selection of Northwest in the Chicago-Miami market and Delta in the Detroit-Miami market require their selection. Our findings of a need for additional service in these markets is based on both first class and coach service needs which Northwest and Delta can provide. Also, Northwest and Delta, with their greater over-all economic strength and operating experience, will be in a better position to fully compete with the established carriers in these markets. Delta and Northwest are also in a superior position to put larger and newer aircraft into these new services than is Capitol. We have even considered an experimental authorization of Capitol's service, in addition to the other new services we are authorizing, but we are unable to find that the advantages of such an experiment outweigh the competitive impact on the other new services we are authorizing. For example, we do not believe the Chicago-Miami traffic, the largest market under consideration, could now support a fourth, albeit special and experimental, service without [fol. 1332] substantial adverse impact on the other competing carriers. Accordingly, Capitol's application will be denied.

We now turn to the motions of Delta and Eastern requesting that the record in this proceeding be reopened. Delta and Eastern have sought to show by submission of data covering their more recent operating experience, that the Chicago-Miami market cannot sustain a third carrier, that traffic and load factors on recent flights have dropped, and that the two presently certificated carriers would be seriously harmed by authorization of a third carrier. Similar contentions were advanced in connection with the certification of a third carrier in the New York-Miami market, but were not persuasive there, and are not here. We have reviewed the recent traffic and service data available from regularly filed carrier reports and schedules, and are satisfied that the most recent experience on the Chicago-Florida route does not alter the validity of the Examiner's finding of a need for a third Chicago-Miami

carrier or indicate that reopening the record is necessary.¹⁷

Delta and Eastern contend that their services are more than adequate to accommodate the available Chicago-[fol. 1333] Florida traffic. However, we agree with the Examiner that the heavy winter season load factors experienced by Delta and Eastern and the record evidence of the difficulties experienced in obtaining space to Florida in the past indicate that this has not been the case. Even though the carriers may have increased their schedule frequencies since the close of the record and even though additional equipment soon to be available could be concentrated on the route in such fashion as to carry every Chicago-Miami passenger on a nonstop flight, the over-all development of a sound air transportation system will be fostered by adding a third carrier in this market.

The Board in the past has recognized the benefits which accrue to the public from stiff multi-carrier competition in major traffic markets in the form of improved quality and quantity of service, increased coach service, utilization of the most modern equipment, etc. We believe that the authorization of a third Chicago-Miami carrier will bring

¹⁷ Our general policy with respect to motions to reopen the record for receipt of data on the most recent operating experience has consistently reflected the requirement of the public interest that the record in major route cases be brought to a close as expeditiously as possible, consistent with the requirements of full hearings, so that final decision may be rendered promptly. Institution of needed new services could be endlessly delayed were we to permit the record to be reopened in the final procedural stages of a case for the submission of more recent operating data (and the attendant cross-examination and exchange of rebuttal evidence). Only in the cases where the situation under consideration has changed radically would such a course of action be justified. We are unable to conclude that such is the case on the basis of the matters submitted by Delta and Eastern. Accordingly, their motions to reopen the record will be denied. We have considered Eastern's other requests for relief but find they should be denied.

comparable benefits here. We do not find that the services Delta and Eastern have provided are legally inadequate in terms of section 404(a) of the Act. However, we find that the Chicago-Miami market is sufficiently large now and has the inherent potential to support three carriers on an economic basis, and that the public interest will be served by certifying a third carrier.

We discount the carriers' arguments against authorizing another carrier because of a recent drop-off in Chicago-Miami traffic. While there was a small decline in March 1957 over March 1956 Chicago-Miami traffic, sizeable increase in September 1957 over September 1956 traffic resulted in an over-all increase for the year 1957 over 1956. The March 1957 decline was in all likelihood attributable to the declining economy, a condition which cannot be regarded as normal. Also, the abnormally bad winter weather in Florida during the 1958 season be blamed for the slackening in Florida traffic which the carriers claim they have experienced in 1958. However, these special circumstances, which influence traffic on a sporadic and temporary basis, cannot be permitted to subordinate the primary factor to be considered; that is, the great growth potential in the Chicago-Florida market which will be spurred by the certification of a third competitive carrier.

Delta's and Eastern's arguments present no real basis for a departure from our established policy of authorizing additional competition in major markets, such as Chicago-Florida, where continued growth can be expected. The results of the competition we have added in major traffic markets in the last few years are now becoming apparent. They show a substantial increase in over-all traffic carried on a passenger and passenger-mile basis. However, the dramatic increase in available seats, following the acquisition of new equipment, has resulted in a drop in load factors over some routes. And it is this decline in load factors which has also been cited as a basis for not authorizing additional competition.

We had occasion to comment on the volume of schedules provided by trunk carriers in our opinions in the *Suspended Passenger Fare Increase Case* and in the so-called *Six*

*Percent Case.*¹⁸ In those cases we cautioned carrier management against ~~overscheduling~~. Now we, in turn, have [fol. 1335] been cautioned about authorizing more competition in this case, on the one hand, and for questioning the volume of service carriers provided in competitive markets, on the other. However, it must be recognized that load factors are an index of traffic *plus* the service provided, and their fluctuation does not, in and of itself, reflect increases or decreases in traffic over a particular route. Thus, the provision of an excess of schedules may artificially reduce load factors even as the traffic carried increases. The accurate measure of a market is, of course, the number of passengers actually carried. In the Chicago-Miami market, the local and beyond traffic has been increasing and has a great potential for continued growth. The decline in load factors cited by Delta and Eastern is attributable to their increase in available seats at a rate in excess of the rate of passenger traffic growth.

It has been suggested that more than enough seats are now available to accommodate all travelers, and that therefore an additional carrier in the market is not needed. This is a familiar argument that has been advanced virtually every time a competing authorization has been sought. Undoubtedly, the *threat* of additional competition may cause carriers temporarily to improve service in particular markets; but the *authorization* of additional competition insures the continued provision of a fully competitive service. From a regulatory point of view, we are convinced that the division of a major traffic market among a number of carriers sufficient to insure a lively competition will result in the continued provision of the greater number of benefits to the traveling public. The Board has long followed this policy, and we see no sound reason to depart therefrom.

[fol. 1336] We recognize that the price of the benefits of competition may be the provision of a volume of service

¹⁸ *Suspended Passenger Fare Increase Case*, Docket No. 8613, Order No. E-11812, September 25, 1957, and *TWA Interim Fare Increase Case*, Docket No. 9288, Order No. E-12203, February 25, 1958.

over and above a "normal" spread between available seats and passengers carried during the initial period following a new carrier authorization. However, we do not regard this result in an expanding major traffic market as contrary to the public interest. With the passage of time and the development of the market, the competing carriers will be better able to gauge the services they provide to their share of the traffic to be obtained. Our policy is justified by experience which has shown that in monopoly markets or certain major markets served by only two carriers, there may be a tendency on the part of the authorized carriers to underschedule or at least to conduct their operations with unduly high load factors. This is understandable from a carrier's profit-making point of view, but it is not consonant with the equally important objective of good service to the public.

Nor are we persuaded that the deterioration in the carriers' earnings positions in recent periods should cause us to deny the public the benefits of competitive service. In developing a sound route structure we must look at the needs of the particular markets under scrutiny in a given proceeding, and give full consideration to the needs of the traveling public in those markets in determining what new services are required. Naturally, we take into account the diversionary impact on other carriers, but that is only one factor to be considered. Where a public need is shown for a new service, we believe it would be unsound to deny it merely on the plea that the general earnings positions of the existing carriers have been depressed.

[fol. 1337] If the existing carriers can prove that they are not making an adequate return, the appropriate remedy may lie in the area of the passenger fare level—not in withholding services that the public needs. After all, our task embraces both the authorization of needed services, and the regulation of fares for such services. We cannot fulfill our responsibilities for developing a sound route structure if we subordinate that function to the preservation of revenues for the existing carriers.

II

We turn now to the Buffalo-Florida route proposals. Our review of the record satisfies us that the route recommended by the Examiner between Buffalo and Florida should be authorized, and that Capital should be selected to provide the important new services the route makes possible. Buffalo, the northern terminal on the route, will receive first single-carrier service to Florida, and more important traffic-wise, Cleveland and Pittsburgh, both major industrial and business centers in the north, will receive first competitive single-carrier service to Florida. Also, the various important cities on Capital's route No. 51 will have single-carrier access to Florida. We fully agree with the Examiner's findings of a need for the recommended new services in these important markets.¹⁹

As indicated above, we also agree with the Examiner's choice of Capital to serve the new route. However, since he based his denial of National's application in large part [fol. 1338] on his recommendation that National serve a new Chicago-Miami route, a recommendation which we have not adopted, we wish to comment on the comparative merits of selecting Capital over National to operate this new route. We recognize that National's historical interest in the traffic under consideration gives it a preference for selection over such applicants as Delta and Northwest, but after looking at all the factors to be considered, we find ourselves in agreement with the Examiner's selection of Capital.

We believe Capital has an advantage for selection in its greater historic interest in and identity with the traffic to be served. Capital is an established carrier in Buffalo, Cleveland and Pittsburgh, and has been providing these cities with service as far south as Atlanta under its present authority. The carrier now serves each of the cities on the northern extension of route No. 51 recommended by

¹⁹ Cleveland-Miami passengers in 1957 averaged 285 per day and Pittsburgh-Miami passengers averaged 195 per day. These two city pairs rank among the top monopoly markets in the country. Cleveland and Pittsburgh-Tampa are also among the top traffic generating city pairs served by a single carrier.

the Examiner. National's interest in the traffic which will move over the new route has been limited to its Buffalo-Pittsburgh-Miami interchange services with Capital operated via Washington. National has no identity in Cleveland or any other of the Great Lakes cities on the new route, whereas Capital provides an important share of their air transportation services. National has carried the Buffalo-Miami interchange passengers farther than Capital and has also carried a considerable volume of Great Lakes-Florida traffic which has moved through the Washington gateway; however, these plus factors are outweighed by Capital's established position in the Great Lakes cities.

Also, because of its present route system in the Great Lakes area, Capital can provide more beyond-segment benefits than can National. National's new services would be limited to the proposed route itself and to such limited traffic to the Great Lakes as would be generated by the smaller Florida points on its present route such as Ft. Myers, Sarasota and Daytona Beach.²⁰ Capital, on the other hand, can provide new single-carrier single-plane service to Florida from the many Great Lakes cities on routes Nos. 14 and 41. As discussed more fully below, we will not permit Capital to provide single-plane service to Florida from such points as Detroit, Toledo, Chicago, Milwaukee and the Twin Cities in competition with other new services we are authorizing herein. However, Capital will be able to provide its other Michigan cities, such as Flint, Lansing and Grand Rapids, with first single-carrier single-plane service to Florida via a stop at such route junction points as Cleveland or Pittsburgh.²¹ Traffic between Flor-

²⁰ Traffic from National's Florida cities to Buffalo, Pittsburgh and Cleveland amounted to a little over 14,000 passengers in 1957; whereas for example an average of 285 passengers moved between Cleveland and Miami per day—well over 100,000 passengers in 1957. National cities included are Daytona Beach, Orlando, Lakeland, Sarasota, Ft. Myers and Key West. It is recognized that the National figures are understated since National was on strike for approximately half the September 1957 survey period.

²¹ Service from Sault Ste. Marie, Cheboygan and Traverse City would also require a stop at Grand Rapids, Lansing or one of the other points common to both routes Nos. 14 and 41.

ida and Capital's Michigan cities (excluding Detroit) amounted to over 15,500 passengers in 1956.²² The only comparable beyond-area traffic National's selection would convenience would be the Havana-Great Lakes traffic which amounted to approximately 2,300 passengers in 1956.²³ Thus, on the basis of beyond-segment traffic benefits, an [fol. 1340] important criterion for selection of Carrier, Capital has a distinct advantage over National.

Perhaps the most important consideration which leads us to select Capital as against National or any other applicant, is the adverse effect on Capital which would unquestionably result from any other selection. Were we to follow such a course, Capital's local traffic between points which are also on the new route and its passengers which have moved to the Southeast partly over Capital's system would be exposed to serious diversion. Such a result is unnecessary in view of Capital's superior claim to the award and would be particularly deleterious in view of its marginal financial position.

The Buffalo-Miami route via Cleveland and Pittsburgh would undoubtedly strengthen National's route system and we are convinced National could provide the needed service. And National, with its past emphasis on development of coach service and its fleet of coach configuration aircraft would be able to develop the coach markets involved more quickly than could Capital. But even giving full weight to these considerations favoring National's selection, we believe the bases for extending Capital's route No. 51 as indicated above are of greater weight.

Various parties have challenged Capital's financial fitness to receive new route awards in this case. These charges include the claims that Capital has been unable to implement recent new route awards, that such extensions have not in fact strengthened Capital, that the carrier has lagged behind in provision of coach service and that it does not have the necessary equipment to provide new services.

The Board recognizes that Capital's route system has been extended into major new markets in recent years and [fol. 1341] that the carrier has not yet fully tapped the

²² Includes traffic from Capital's Michigan cities except Detroit to Miami, Tampa-St. Petersburg, West Palm Beach and Jacksonville.

²³ Includes Buffalo/Pittsburgh/Cleveland-Havana traffic.

potential available to it. And we recognize that our extension of Capital to Florida in the present case will further expand the carrier's system into additional major traffic markets and require an over-all increase in the air services it must provide. However, were we to select another carrier to provide the needed new services over the Buffalo-Miami route, merely because that carrier could provide more service more quickly, we would be denying the public the greater number of single-carrier services which only Capital can provide and would be seriously undermining Capital's recent improvement in its financial situation.

The recent operating data, which show important increases in the volume of service Capital has provided, belie the claims that the carrier is unable to expand its operations. For example, for the twelve months ended March 31, 1958, as compared with the twelve prior months, Capital increased its revenue-passenger miles by 37.3 percent and its available seat miles by 39.4 percent. Its over-all revenue ton-miles increased by 37.7 percent, its over-all revenue load factor increased 1.1 point and its coach revenue-passenger load factor was up 2.4 points.

Even in the face of generally increased operating costs and its Viscount re-equipment program, Capital reported a \$703,000 operating profit for the twelve months ended March 31, 1958, as compared to an operating loss of \$2,263,000 for the twelve months ended March 31, 1957. Capital's ability to make this showing during a period of expansion into new markets and the integration of its Viscount services into major highly competitive markets, rebuts any claims that Capital is unable to assimilate new or extended authorizations.

[fol. 1342] The route extensions proposed for Capital herein will add strength to the carrier's system and undoubtedly further improve its financial position.²⁴ One important reason for Capital's marginal position is the fact

²⁴ The recent "6.6%" fare increase should substantially aid Capital in improving its financial position, especially the \$1.00 per ticket increase. This facet of the fare increase is of particular importance for a short-haul carrier such as Capital, since the flat increase applies to each ticket sold, regardless of the mileage involved.

that Capital's length of haul is the shortest of all trunk carriers. Thus, although its passengers have increased substantially in recent periods, Capital carries them for only relatively short distances or for only a portion of their journey. Our grant in the present case will add over 50 miles to Capital's average length of haul²⁵ which, in terms of revenue, will mean roughly an additional \$2.50 per passenger carried.

As to the question of equipment, Capital tried its case on the basis of utilizing Constellation and Viscount aircraft it presently owns, a plan which we have reviewed and which we believe is at least adequate for purposes of resolving the issues before us. We have no doubt that with the important markets being made available to the carrier by our extensions herein, Capital will be able to acquire such additional aircraft as may be needed in the future to satisfy the needs of traffic growth. We were confronted with the same issue with respect to Braniff in the *Southwest-Northeast Service Case*. There we said:

"It would defeat our objective of greater competitive balance, and in the long run work a serious injury to the public interest, if we were to give undue weight [fol. 1343] herein to the relative ability for early inauguration of a full pattern of competitive service. We are confident that Braniff will obtain satisfactory first line aircraft and provide the type of competitive spur needed in the markets it is being authorized to serve."²⁶

The same considerations apply here as to our selection of Capital to serve the Buffalo-Miami route.

We have little doubt but that an established trunk carrier, such as Capital, permanently licensed to operate regulated air transportation service in major traffic markets, is fit, willing and able within the meaning of the Act, and that it will be able to expand its base of operations to the extent necessary to accommodate the needs of the new markets

²⁵ Capital's average length of haul for the year ended May 31, 1958, was 388 miles. With the Florida and Buffalo extension, it would be increased to approximately 438 miles.

²⁶ Order No. E-9758, November 21, 1955, mimeo, p. 15.

certificated herein. The history of the growth and development of the trunk carrier industry gives ample evidence of this fact. We recognize that it may take time for Capital to fully develop and exploit the traffic available under the authority we are granting, but by the same token, the route pattern which we are establishing is not of a short-term nature only, but is based on the needs of the future as well as of the present. These various considerations convince us that Capital rather than any of the other applicants should be authorized to serve the Buffalo-Miami route and that Capital is fit, willing and able to receive the award.

III

We agree with the Examiner that the improved services made possible by the extension of Eastern's route No. 6 from Charleston, W. Va., to Chicago via Cincinnati are required; however, we believe that the need for direct service between Raleigh-Durham and Chicago and the other [fol. 1344] Great Lakes cities has also been clearly demonstrated. Accordingly, we will add Raleigh-Durham as an intermediate point between Roanoke and Greensboro-High Point on Eastern's Chicago- and Detroit-Miami leg of route No. 6.²⁷ Raleigh-Durham has generated a substantial volume of traffic to the Great Lakes area despite the extreme circuitry and inconvenience of existing service. Present single-carrier service to Chicago, provided by Eastern, moves over a circuitous routing via Charlotte, Chattanooga and other intermediate points.²⁸ The only other available Chicago service is via connections at Cincinnati or Washington. Despite these handicaps, Raleigh-Durham, with a metropolitan population in excess of 300,000, exchanged over 17,000 passengers with the Great Lakes area cities during the two 1956 Survey periods.²⁹ The

²⁷ Raleigh-Durham is now an intermediate point on the New York leg of route No. 6.

²⁸ The service must operate over a combination of Eastern's routes Nos. 5 and 10.

²⁹ Including Raleigh-Durham on the Chicago- and Detroit-Miami leg of route No. 6 will permit direct service to such important points as Chicago, Cincinnati, Cleveland, Detroit, Akron-Canton, and Pittsburgh.

latest data show that 528 passenger moved between Chicago and Raleigh-Durham during the 1957 Survey periods—almost 7000 passengers when expanded to an annual figure. This volume of traffic is significantly greater than that generated by any of the other Carolina cities except Charlotte which has had more, if not better, service to Chicago.³⁰ With Raleigh-Durham's importance as a manufacturing, military and educational center in mind, we are satisfied that the point should be added to Eastern's direct route to Chicago.

[fol. 1345] Eastern is not presently authorized to provide direct service between Raleigh-Durham, on the one hand, and Winston-Salem, Greensboro-High Point, Roanoke and Charleston, W. Va., on the other. Piedmont Aviation, Inc. (Piedmont) is authorized to provide local service in these markets. Thus, in order to minimize diversion of local passengers between Raleigh-Durham, on the one hand, and the cities on Eastern's route No. 6 which are also served by Piedmont, on the other, we will require flights serving Raleigh-Durham and the above-named points to originate at Chicago or a point north of Charleston, W. Va., and terminate at Savannah or a point south thereof, or originate at Savannah or a point south thereof and terminate at Chicago or a point north of Charleston, W. Va. We note Eastern's statement on brief that it has no intention of competing for Piedmont's Raleigh-Durham to Greensboro-High Point and Winston-Salem traffic and that it would be willing to accept a closed-door restriction in these markets. However, as we have had occasion to note previously, closed-door restrictions are confusing to the traveling public and deny the through carrier such intermediate traffic support for long-haul operations as may move on the long-haul flights. Piedmont had requested denial or deferral of Eastern's new service proposals in this area. However, we are convinced the long-haul services authorized are required by the public interest and that the restriction we are adopting will adequately limit the competitive impact on Piedmont's local markets without interfering with provision of the required Raleigh-Durham long-haul services.

³⁰ Our route 6 extension will, of course, also improve Charlotte's service to Chicago.

IV

The Examiner recommended an extension of Eastern's route No. 10 from Louisville to Detroit via Cincinnati and [fol. 1346] Fort Wayne. However, the new and improved services incident to this recommendation are, for the most part, made available by our other authorizations herein. Thus, by extending Delta's route No. 54 from Cincinnati to Detroit, by adding Louisville and Indianapolis as new intermediate points on Delta's route No. 54, and by adding Cincinnati to Eastern's route No. 6,³¹ we will provide competitive service between Louisville and Detroit; Cincinnati and Detroit; Cincinnati, Detroit and Louisville to the Southeast, and single-carrier service between Fort Wayne and the Southeast. We conclude, therefore, that the Eastern route No. 10 extension to Detroit is not required.

As noted above, adding Louisville to Delta's route No. 54 satisfies the need for competitive service to Detroit which the Examiner found to exist, and also affords competitive service to Chicago and the Southeast. Cincinnati will also receive new competitive service to Detroit via Delta and to the Southeast via Eastern. As to Fort Wayne, we find that its needs for service to Florida do not warrant a direct Eastern routing.³² Rather, its needs are satisfied by the Delta single-carrier service made possible by the addition of Indianapolis as an intermediate point on route No. 54. Fort Wayne and Indianapolis are now served on Delta's Detroit-New Orleans route No. 8, so with the addition of Indianapolis to route No. 54, Fort Wayne can be afforded single-carrier service to the Southeast via the [fol. 1347] Indianapolis route junction point.³³ Other area

³¹ The Examiner recommended the Delta extension to Detroit and the Eastern route No. 6 extension to Cincinnati and Chicago; however, he would have added Indianapolis and Louisville to his proposed new Chicago-Miami route for National.

³² Based on the 1957 Surveys, Fort Wayne generated only 3.6 daily passengers to Atlanta, 4.7 to Tampa-St. Petersburg and 9.2 to Miami.

³³ Basically the same considerations which apply to Fort Wayne also apply to Eastern's proposal to serve Ashland-Huntington on a new Detroit-Atlanta segment. Ashland-

cities such as Dayton, Columbus and Toledo, which Eastern asks be included on the route No. 10 extension, will receive improved service to the Southeast by means of our Detroit-Cincinnati extension of Delta's route No. 54.

TWA is the existing carrier in the Cincinnati-Dayton-Columbus-Toledo-Detroit markets which Delta will now be able to serve. In the *TWA Cincinnati-Detroit Route Transfer Case*, Docket No. 7378, we are issuing an order, concurrently with our decision herein, instituting a proceeding looking toward the possible deletion of the Detroit-Cincinnati segment from TWA's route and the authorization of a local service in these markets. However, this action does not derogate from our denial of Eastern's application for an extension of route No. 10, since Delta will provide the Ohio cities with their needed service to the Southeast and another carrier—either TWA or a local service carrier—will continue to provide competitive local service. Whether such action as is taken in the new proceeding will affect the service in the Louisville-Detroit local market is an issue to be considered at that time. For the present, our authorization of Delta to serve Louisville adequately provides for the needed competitive Louisville-Detroit service.

Our action in this area satisfies the traffic needs of the points involved and achieves a more equal balance between the two area competitors—Delta and Eastern. Competitive service between all the major points and the Southeast—our major concern in this case—is provided without giving Eastern the competitive advantages of two alternate routings between Detroit and Miami. Two Eastern Detroit-Miami routings with the support of the various routes 6 and 10 intermediate points could, in our opinion, seriously cripple Delta's efforts to effectively compete in the Detroit-Florida market. In view of our other authorizations, such a result is not required to meet area traffic needs.

Eastern has also proposed the addition of Atlanta as

Huntington's service needs do not justify establishment of a separate segment to provide direct long-haul service. The 1957 Surveys show approximately 4.1 passengers per day to Atlanta, 2.3 to Tampa-St. Petersburg and 7.4 to Miami. The route would also be directly competitive with the Detroit-Atlanta route we are granting to Delta.

an intermediate point on route No. 6. This would make possible nonstop service between Atlanta, on the one hand, and Detroit, Cleveland, Pittsburgh and various other cities on Eastern's Detroit-Miami leg of route No. 6.³⁴ However, we are authorizing Delta to provide Detroit-Atlanta nonstop service by means of the Cincinnati-Detroit extension of route No. 54, and are authorizing Capital to provide Cleveland-Atlanta nonstop service by the Buffalo-Pittsburgh extension of route No. 51. Capital is presently authorized to provide Pittsburgh-Atlanta nonstop service. We believe these authorizations afford ample opportunity for provision of all the service required in these markets. It may be noted that the traffic to Atlanta is significantly less heavy than that to Florida. For example, in 1957 there were 50 daily Detroit-Atlanta passengers, 33 Cleveland-Atlanta passengers and 32 Pittsburgh-Atlanta passengers as contrasted with 414 daily Detroit-Miami passengers, 285 Cleveland-Miami passengers and 195 Pittsburgh-Miami passengers. Eastern's one-stop service to Atlanta plus the new nonstop authorizations will, in our opinion, suffice [fol. 1349] to insure good service for this traffic. On the other hand, were we to add Atlanta to route No. 6, Eastern would acquire an important competitive advantage because of its entrenched position in Atlanta, which would deter development of a full pattern of Great Lakes-Atlanta services by Delta and Capital. Accordingly, we are denying Eastern's request.³⁵

³⁴ Chicago-Atlanta nonstop service is presently authorized over route No. 10.

³⁵ In connection with its request to add Atlanta as an intermediate point on route No. 6, Eastern also seeks removal of the present restriction against service to Augusta and Charleston, S. C., on the same flight. Adding Atlanta to route No. 6 and removing the restriction on Augusta-Charleston, S. C., service would permit direct service between Atlanta, on the one hand, and Augusta, Columbia, Florence, Charleston, S. C., Savannah and Brunswick, and between the Georgia and South Carolina cities and points north and west of Atlanta. Most of these points are, however, served by Delta, which can provide them with direct service to Atlanta, and to such major cities as Chicago and

V

The Examiner found no need to authorize an additional carrier in the Chicago-Washington market, but he recommended removal of the long-haul restrictions on the non-stop services of TWA and United ³⁶ so as to permit both carriers to operate unlimited turnaround flights in addition [fol. 1350] to those of American and Capital. We cannot agree that the long-haul restrictions should be lifted. ³⁷

The Chicago-Washington services of TWA and United were authorized as a means of permitting these trans-continental carriers to make their long-haul services available to Washington and Chicago, and the existing restrictions accomplish that purpose without authorizing un-

Detroit to the north. The record does not indicate a sufficient volume of traffic to warrant authorizing Eastern to provide competitive service from these Georgia and Carolina cities to Atlanta and beyond.

Essentially, the same considerations apply to Delta's requests to connect Columbia and Augusta, served on route No. 54, with Charlotte, served on route No. 24, by adding Charlotte as an intermediate point on route No. 54; and its request to add Greensboro-High Point-Winston-Salem as an intermediate point on route No. 54. Eastern is presently authorized to serve these cities and will be able to offer them single-plane service to Chicago, Detroit and its other route No. 6 points to the north. We are unable to find that the traffic involved warrants authorization of competitive service by Delta or by any other carrier.

³⁶ TWA's Chicago-Washington nonstop flights must originate or terminate at Kansas City or a point west thereof. United's nonstop flights must originate or terminate at Omaha or a point west thereof.

³⁷ We have also considered the various east-west new route applications involving services to points between Chicago and Washington and have considered the various "closing of the gap" applications which involve essentially east-west service. Like the Examiner, we conclude that they should all be denied except for the removal of certain Northwest and TWA restrictions, the authorization of United's Chicago-Dayton-Columbus-Washington segment and the addition of Baltimore on Northwest's route No. 3.

needed turnaround services between Chicago and Washington.³⁸ Where, as here, there are already two carriers, American and Capital, authorized to operate shuttle service between Chicago and Washington, we feel that there should be substantial reasons for injecting two more shuttle services before authorizing them. Even the Examiner recognized that there was no public need for the additional services, for he found that the Chicago-Washington market "enjoys an abundance of nonstop service". He went on to conclude that the TWA and United restrictions should be lifted to permit "greater elasticity" in the carrier's operations. It is true that lifting the restrictions would permit greater flexibility in the carriers' operations, but this consideration is heavily outweighed by other factors.

Chicago-Washington is an important regional market which has been intensively exploited and developed by Capital in competition with American's unrestricted service. Capital provided 14 nonstop round trips per day in [fol. 1351] May.³⁹ and the market is Capital's second most important in terms of passengers and passenger-miles. Unrestricted TWA and United turnaround services in the Chicago-Washington market could very seriously affect Capital's financial position. As noted earlier, that carrier is not in a strong financial position, and increased TWA or United turnaround schedules could well divert a substantial portion of the \$3.7 million in revenues which Capital derived from this traffic in 1956. We cannot agree that such a result is justified merely to give the transcontinental carriers greater operational flexibility. If we were to adopt such a policy, no restrictions could be justified and the competitive balance between carriers would be destroyed and the position of the smaller carriers seriously jeopardized.

³⁸ *American Airlines, Inc., et al., Consolidation of Routes*, 7 C.A.B. 337 (1946).

³⁹ The Examiner did not believe the Chicago-Washington market was "so saturated" with nonstop flights as to preclude lifting the TWA and United restrictions. Without holding more than that the Chicago-Washington services appear ample, as the Examiner also found, we would regard any increased competition with Capital's services resulting from the lifting of the restrictions as unnecessary and undesirable.

dized. In view of these circumstances and the ample service now being provided by Capital and American, the two unrestricted carriers, and by TWA and United, on their long-haul flights,⁴⁰ we cannot find that the public convenience and necessity require lifting the restrictions in question.⁴¹

[fol. 1352]

VI

The various new authorizations which we are granting herein present a number of situations in which imposition of restrictions in addition to, or somewhat different from those recommended by the Examiner are required. We shall discuss these issues on a carrier by carrier basis.

Capital

Our extension of Capital's route No. 51 from Pittsburgh to Buffalo via Youngstown, Akron-Canton, Cleveland and Erie raises problems of the impact of Capital's new service on services presently provided in this area by Lake Cen-

⁴⁰ The TWA and United Chicago-Washington restrictions are similar in purpose to United's long-haul restriction on Pittsburgh-Chicago service, with which we are concerned in an order in the *New York-Chicago Case*, Docket No. 986 *et al.*, being issued concurrently with our decision herein. Pittsburgh was added to United's system to meet its needs for long-haul service to the west, and a long-haul restriction was imposed to prohibit turnaround service since no need for an additional turnaround carrier had been shown.

⁴¹ The argument that as the trend toward nonstop operations progresses, TWA and United will have less long-haul traffic support for their local Chicago-Washington services and that their participation in this market will decrease, does not cause us to modify our conclusion. We recognize that such a result is possible in various markets throughout the country, but on the facts of the present case, the remedy, if one is presently required, is not to permit the stronger transcontinental carriers, TWA and United, to compete on an unrestricted basis in a regional market with Capital, one of the smaller trunks. There can be no question but that under all the facts, there would be no justification in adding strength to two Big Four carriers at the expense of Capital.

tral. As indicated previously, our purpose in extending Capital's route to Buffalo (and to Miami) is to make available the long-haul services to the Southeast which these points have demonstrated they require. It is not our intention to authorize and no need has been shown for an additional primarily local service in this area. Accordingly, we are imposing a long-haul restriction on Capital's Buffalo-Youngstown, Erie-Cleveland and Erie-Youngstown services—services which Lake Central is also authorized to provide.⁴² Flights serving these pairs of points will be required to originate or terminate at Charleston, W. Va., or a [fol. 1353] point south thereof. We believe this restriction will effectively prevent Capital from concentrating service in these short-haul local markets and will insure provision of the long-haul services required. We do not believe it necessary or desirable to proscribe Capital's trunk operations in these local markets entirely, since such closed-door restrictions are objectionable to the traveling public and deny the trunk carrier the support for its long-haul flights of such traffic as may move between intermediate points. In the present instance, we believe the requirement to serve Charleston, W. Va., or a point south thereof, will satisfy our purposes without unnecessarily limiting Capital freedom to schedule flights over the new route.

We also believe a restriction is required with respect to Capital's Atlanta-Florida extension. Little need exists for additional local service between Atlanta, Jacksonville, Tampa-St. Petersburg-Clearwater, West Palm Beach and Miami, since Delta, Eastern and National presently serve these various local markets. As indicated above, the Capital extension to Florida is intended to satisfy the need of Capital's more northerly points for service to Florida. It is therefore appropriate for us to restrict Capital from providing turnaround service south of Atlanta.

Our extension of route No. 51 to Cleveland, a route junction point on routes Nos. 14 and 41, would, without appropriate restriction, permit single-plane one-stop serv-

⁴² Lake Central had also requested imposition of a restriction on Buffalo-Erie service by Capital; however, Capital presently holds authority to operate on an unrestricted basis in this market under its certificate for route No. 46.

ice between Florida points, on the one hand, and such major cities as Detroit, Toledo, Chicago, Milwaukee and the Twin Cities, on the other hand. However, by our other route extensions herein, we are providing for service improvements between these named cities and the Southeast via other carriers. Thus, Northwest will provide Twin [fol. 1354] Cities-, Milwaukee-, and Chicago-Florida services and Delta will provide Detroit- and Toledo-Florida services. No need has been shown for an additional service by Capital in these markets. Therefore, it is necessary to appropriately restrict Capital in these markets. We have decided that this may be accomplished by prohibiting single-plane service between the above-named cities and Capital's new Florida points. We are not, however, restricting Capital's freedom to provide single-plane service between Florida and its routes Nos. 14 and 41 Michigan cities, such as Lansing, Flint and Grand Rapids, where no comparable competitive situation exists. These services will be permitted via a stop at an appropriate route junction point.

Somewhat similar considerations require a restriction against single-plane service between Capital's new Florida points and other points served on route No. 51 along the eastern seaboard. Obviously, we do not intend, in this case, to authorize Capital as a fourth New York-Miami carrier. Issues of service in these various east coast markets were recently considered and acted upon by the Board in the *New York-Florida Case*, Docket No. 3051 *et al.*, wherein Capital's application to serve these markets was denied.⁴³ Accordingly, we will impose a restriction prohibiting Capital from providing single-plane service between its new Florida cities, on the one hand, and New York, Newark, Philadelphia, Harrisburg and the points north and east of Asheville on the east coast leg of route No. 51, on the other hand. And in accordance with the limitations on the scope of the present proceeding, we will prohibit nonstop service between Capital's new route No. 51 points, and [fol. 1355] route No. 51 points outside the geographical scope of the case. This will require a restriction against nonstop service between Buffalo, Erie, Cleveland, Akron-

⁴³ Order No. E-10645, September 28, 1956.

Canton and Youngstown, on the one hand, and Memphis, Huntsville, Birmingham, Mobile and New Orleans, on the other hand.⁴⁴

Although presently authorized by its certificates for routes Nos. 14 and 46 to provide service to all the points on the proposed Buffalo-Pittsburgh route No. 51 extension, Capital is not presently authorized to engage in direct air transportation between Buffalo and Cleveland. This is a local market of a type not essentially in issue in this case; and a substantial question has been raised as to whether any of the consolidated applications covered a Cleveland-Buffalo local service authorization. Apparently no carrier prosecuted an application which would include a Buffalo-Cleveland service, and both American and Mohawk claim lack of notice that this authority was to be considered in this case. With these various considerations in mind, we have decided to prohibit Capital from engaging in air transportation in the Buffalo-Cleveland market. Both points may, however, be served on the same flight to the Southeast.

Delta

We have also decided that Delta's services over the route No. 54 extension north of Cincinnati to Detroit should be subject to a long-haul restriction requiring flights serving Detroit and the new Ohio intermediate points, to originate or terminate at Atlanta or a point south thereof. This [fol. 1356] restriction will insure provision of the long-haul services we have found required, and only allow the carrier to participate in the Cincinnati-Dayton-Columbus-Toledo-Detroit local markets on a limited basis. The need for turnaround local service operations in these markets will be the subject of direct inquiry in a new investigation being instituted contemporaneously herewith in the *TWA Cincinnati-Detroit Route Transfer Case*.

As noted above, we do not believe additional turnaround

⁴⁴ A specific restriction against nonstop service between Capital's new Florida points and the points to the west as named above, is not required since under the certificate authorization such services would require a stop at Atlanta or Asheville, the segment bifurcation points.

services south of Atlanta are required. Thus, we will require Delta's flights serving the new points Orlando and West Palm Beach to originate or terminate at a point north of Atlanta. Although we are also adding Tampa-St. Petersburg-Clearwater to Delta's route No. 54, we are not imposing the same restriction on Tampa service since it is our intention to grant Delta equal authority to serve Tampa as is now held by Eastern in their common markets from Atlanta to Florida.

Eastern

As in the case of other trunkline authorizations herein, we will place a long-haul restriction on Eastern's services to Cincinnati and Chicago over the new route No. 6 extension from Charleston, W. Va., requiring flights serving Cincinnati and Chicago to originate or terminate at Charlotte or a point south thereof. This restriction, while permitting the long-haul service we have found required, will protect Piedmont's local traffic between Cincinnati and other points in the Carolina area served by both Eastern and Piedmont.⁴⁵ Clearly there is no reason on this record [fol. 1357] to authorize Eastern to provide turnaround local service competitive with Piedmont in these markets (between Cincinnati and such points as Roanoke, Winston-Salem and Greensboro-High Point). The long-haul restriction we are imposing will afford sufficient protection of Piedmont without unnecessarily restricting Eastern's flights in this area.

We are also imposing a restriction prohibiting single-plane service between Cincinnati, on the one hand, and Washington and points to the northeast on Eastern's routes Nos. 5 and 6, on the other hand. In the absence of a restriction, such a service could be provided via the Charleston, W. Va., route junction point. As in the case of Capital's New York-Miami single-plane restriction, Cincinnati-Washington service by Eastern was recently considered and denied by the Board in the *Eastern Route Consolidation*.

⁴⁵ For our discussion of the restriction on Eastern's Raleigh-Durham service see page 28 above.

tion Case, Docket No. 3292 *et al.*⁴⁶ We are accordingly prohibiting provision of a similar service via Charleston, W. V., which would otherwise be possible under a combination of the authorization granted in the present case and Eastern's present route No. 5 certificate.

We have also found it necessary to impose a prohibition against San Juan-Cincinnati nonstop service in Eastern's route No. 6 certificate. Eastern's route No. 108 certificate permits nonstop service between San Juan and any route No. 6 or 10 point. However, as indicated above, the limits of this case expressly exclude authorization of nonstop service between new points within the area and points outside the geographical area of the case.

[fol. 1358] Northwest

For the same reasons as are more fully discussed above with respect to the Capital restrictions, we are prohibiting Northwest from providing turnaround service between Atlanta, Tampa-St. Petersburg-Clearwater and Miami.

TWA

In order to protect Lake Central's local Indianapolis-Cincinnati traffic, we will place a long-haul restriction on TWA's nonstop service being authorized in this market. We are granting TWA's request that the present prohibition against Indianapolis-Cincinnati nonstop service be lifted, but will require flights scheduled to serve these points to serve St. Louis or a point west thereof or Pittsburgh or a point east thereof. This will permit TWA to serve both points on the same flight without, at the same time, authorizing a local turnaround type of service directly competitive with Lake Central.

United

With respect to United's new route serving Dayton and Columbus, we are imposing long-haul restrictions to protect Lake Central in its Chicago-Dayton, Chicago-Columbus and Columbus-Dayton markets. Flights scheduled to serve these markets will be required to serve both Chicago and

⁴⁶ Supplemental Opinion and Order on Reconsideration No. E-11606, July 23, 1957.

Washington, the points to which the Ohio cities' greatest need for additional service was shown. Here again, the authorization we are granting is appropriately restricted to limit the impact of needed long-haul services on the local service carrier operating in the area.

In imposing the various restrictions discussed above, we believe we have achieved an appropriate accommodation between the needs of the traveling public for long-haul [fol. 1359] services, the requirements of the subsidized local service carriers for protection against undue diversion, and the basic policy of affording operators, of new routes the maximum amount of flexibility in conducting their new operations.

We have considered the various other contentions and exceptions of the parties but do not find that they should alter the results reached herein.⁴⁷

On the basis of the foregoing considerations and all the facts of record we find:

1. That the public convenience and necessity require the amendment of Capital's certificate for route No. 51

(a) by extending the route beyond the intermediate point Pittsburgh, Pa., to the terminal point Buffalo, N. Y., via the intermediate points Youngstown, Akron-Canton, and Cleveland, Ohio, and Erie, Pa.;

(b) by extending the route beyond the intermediate point Atlanta, Ga., to the terminal point Miami, Fla., via

⁴⁷ Nashville, a rule 14 participant in the case, has requested a reopening of the record to show its needs for service to the northeast. However, no new matters have been submitted which were not previously considered by the Board on the two previous occasions when Nashville's motions to be made a party to the proceeding were denied. Orders Nos. E-9734, November 10, 1955 and E-10043, February 28, 1956. Accordingly, Nashville's motion will be denied.

Motions have also been filed requesting contemporaneous consideration of this proceeding with the *Chicago-Milwaukee-Twin Cities Case*, Docket No. 3207 *et al.* On consideration of the contentions made, we find that the motions should be denied.

the intermediate points Jacksonville, Tampa-St. Petersburg-Clearwater, and West Palm Beach, Fla.; and [fol. 1360] (c) adding the following restrictions:

"(10) The holder shall not provide turnaround service between any of the following points: Atlanta, Ga., Jacksonville, Tampa-St. Petersburg-Clearwater, West Palm Beach, and Miami, Fla."

"(11) The holder shall not provide single-plane service between points in Florida, on the one hand, and Minneapolis-St. Paul, Minn., Milwaukee, Wisc., Chicago, Ill., Detroit, Mich., or Toledo, Ohio, on routes Nos. 14 and 41, on the other hand."

"(12) The holder shall not provide single-plane service between points in Florida, on the one hand, and New York, N. Y.; Newark, N. J.; Philadelphia or Harrisburg, Pa., or points north and east of Asheville, N. C., at described in segments 2 and 3, on the other hand."

"(13) The holder shall not engage in air transportation between Buffalo, N. Y., and Cleveland, Ohio."

"(14) Flights scheduled to serve Buffalo, N. Y., and Youngstown, Ohio; Erie, Pa., and Cleveland, Ohio; or Erie, Pa., and Youngstown, Ohio, shall originate or terminate at Charleston, W. Va., or a point south thereof."

"(15) The holder shall not provide nonstop service between Buffalo, N. Y.; Erie, Pa.; Cleveland, Ohio; Akron-[fol. 1361] Canton, Ohio, or Youngstown, Ohio, on the one hand, and Memphis, Tenn.; Huntsville, Ala.; Birmingham, Ala.; Mobile, Ala., or New Orleans, La., on the other hand."

2. That the public convenience and necessity require the amendment of Delta's certificate for route No. 54

(a) by extending the route beyond the intermediate point Cincinnati, Ohio, to the terminal point Detroit, Mich., via the intermediate points Dayton, Columbus, and Toledo, Ohio;

(b) by adding the intermediate point Indianapolis, Ind., between the terminal point Chicago, Ill., and the intermediate point Anderson-Muncie-New Castle, Ind.;

(c) by adding the intermediate point Louisville, Ky., between the intermediate points Cincinnati, Ohio, and Lexington, Ky.;

(d) by redesignating the terminal point Charleston,

S. C., as an intermediate point and extending the route from the intermediate point Charleston, S. C., to the intermediate point Savannah, Ga.;

(c) by adding the intermediate points Orlando, Tampa-St. Petersburg-Clearwater and West Palm Beach, Fla., between the intermediate point Jacksonville, Fla., and the terminal point Miami, Fla.; and

(f) by adding the following restrictions:

“(6) Flights scheduled to serve two or more of the following points shall originate or terminate at Atlanta, Ga., [fol. 1362] or a point south thereof: Detroit, Mich., Toledo, Columbus, Dayton and Cincinnati, Ohio.”

“(7) Flights serving Orlando or West Palm Beach, Fla., shall originate or terminate at a point north of Atlanta, Ga.”

3. That the public convenience and necessity require the amendment of Eastern's certificate for route No. 6

(a) by extending the route beyond the intermediate point Charleston, W. Va., to the terminal point Chicago, Ill., via the intermediate point Cincinnati, Ohio;

(b) by adding the intermediate point Raleigh-Durham, N. C., between the intermediate points Greensboro-High Point, N. C., and Roanoke, Va., and

(c) by adding the following restrictions:

“(6) The holder shall not provide single-plane service between Cincinnati, Ohio, on the one hand, and Washington, D. C., or points north thereof on routes Nos. 5 or 6, on the other hand.”

“(7) Flight scheduled to serve Chicago, Ill., on route No. 6, or Cincinnati, Ohio, shall originate or terminate at Charlotte, N. C., or a point south thereof.”

“(8) Flights serving Raleigh-Durham, N. C., on the one hand, and Charlotte, Winston-Salem or Greensboro-High Point, N. C., Roanoke, Va., or Charleston, W. Va., on the other hand, shall originate at Chicago, Ill., or a point north [fol. 1363] of Charleston, W. Va., and terminate at Savannah, Ga., or a point south thereof, or originate at Savannah, Ga., or a point south thereof and terminate in Chicago, Ill., or a point north of Charleston, W. Va.”

“(9) The holder shall not provide nonstop service be-

tween Cincinnati, Ohio, and San Juan, Puerto Rico, on route No. 108.⁴⁸

4. That the public convenience and necessity require the amendment of Northwest's certificate for route No. 3

(a) by adding a new segment "5" between the terminal point Chicago, Ill., the intermediate points Atlanta, Ga., and Tampa-St. Petersburg-Clearwater, Fla., and the terminal point Miami, Fla.;

(b) by redesignating the terminal point in Washington, D. C., as an intermediate point and adding the terminal point Baltimore, Md., on segment 2;

(c) by amending condition (4) to eliminate restrictions on service between Detroit, Cleveland, Pittsburgh and Washington; and

(d) by adding the following restriction:

"(8) The holder shall not provide turnaround service between any of the following points: Atlanta, Ga., Tampa-St. Petersburg-Clearwater and Miami, Fla."

[fol. 1364] 5. That the public convenience and necessity require the amendment of TWA's certificate for route No. 2.⁴⁹

(a) by eliminating the present restriction prohibiting scheduled nonstop service between Indianapolis, Ind., and Cincinnati, Ohio; and

(b) by adding a new restriction as follows:

"Indianapolis, Ind., and Cincinnati, Ohio, shall be served on the same flight, only if such flight also serves St. Louis, Mo., or a point west thereof, or Pittsburgh, Pa., or a point east thereof."

⁴⁸ Since Eastern is authorized to provide Chicago-San Juan nonstop service by its certificates for routes Nos. 10 and 108, a similar prohibition of Chicago-San Juan nonstop service is not required.

⁴⁹ An amended certificate for TWA's route No. 2 incorporating the amendment referred to above is being issued with our opinion in the *St. Louis-Southeast Service Case*, Docket No. 7735 *et al.*, which is being issued contemporaneously herewith.

6. That the public convenience and necessity require the amendment of United's certificate for route No. 1

(a) by adding a new segment "8" between the terminal point Chicago, Ill., the intermediate points Dayton and Columbus, Ohio, and Washington, D. C., and the terminal point Baltimore Md.; and

(b) by adding the following restriction:

"(16) Flights scheduled to serve Chicago, Ill., and Dayton, Ohio; Chicago, Ill., and Columbus, Ohio; or Dayton and Columbus, Ohio; shall also serve Chicago, Ill., and Washington, D. C."

7. That Capital, Delta, Eastern, Northwest, TWA and United are fit, willing, and able properly to perform [fols. 1365-1380] the transportation described herein, and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder;

8. That the various motions filed by Eastern, Delta, Northwest, Nashville, and Wisconsin requesting reopening of the record; contemporaneous consideration with the *Chicago-Milwaukee-Twin Cities Case*, and other relief should be denied;

9. That, except as granted herein, all applications in this proceeding should be denied; and

10. That this proceeding and the *New York-Florida Case*, Docket No. 3051 *et al.*, should be terminated.

An appropriate order will be entered.

[fol. 1381] BEFORE THE CIVIL AERONAUTICS BOARD

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

—September 30, 1958

Issued pursuant to Order No. E-13024

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

for Route No. 54

Delta Air Lines, Inc., is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

1. Between the terminal point Chicago, Ill., the intermediate points Indianapolis and Anderson-Muncie-New Castle, Ind., Cincinnati, Ohio, Louisville and Lexington, Ky., Knoxville, Tenn., Asheville, N. C., and Greenville-Spartanburg, S. C., and beyond Greenville-Spartanburg, S. C., the intermediate points (a) Columbia and Charleston, S. C., and Savannah, Ga., or (b) Augusta and Savannah, Ga., and beyond Savannah, Ga., the intermediate points Brunswick, Ga., Jacksonville, Orlando, Tampa-St. Petersburg-Clearwater and West Palm Beach, Fla., and the terminal point Miami, Fla.;

2. Between the terminal point Chicago, Ill., the intermediate points Indianapolis and Anderson-Muncie-New Castle, Ind., Cincinnati, Ohio, Louisville and Lexington, [fol. 1382] Ky., Knoxville and Chattanooga, Tenn., Atlanta, Ga., and beyond Atlanta, Ga., the intermediate points (a) Macon and Savannah, Ga., or (b) Augusta, Ga., and beyond Augusta, Ga., the intermediate points (i) Columbia and Charleston, S. C. and Savannah, Ga., or (ii) Savannah, Ga., and beyond Savannah, Ga., the intermediate points Brunswick, Ga., Jacksonville, Orlando, Tampa-St. Petersburg-Clearwater and West Palm Beach, Fla., and the terminal point Miami, Fla.; and

3. Between the terminal point Detroit, Mich., the inter-

mediate points Toledo, Columbus, Dayton and Cincinnati, Ohio, and beyond Cincinnati, Ohio, as described in segments 1 and 2.

The service herein authorized is subject to the following terms, conditions and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate, as amended; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to [fol. 1383] the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) The holder shall serve Miami, Fla. only on flights originating or terminating at points north of Jacksonville, Fla.

(4) The holder shall not engage in local air transportation between Knoxville, Tenn., and Chattanooga, Tenn.

(5) Notwithstanding the linear route description in this certificate, as amended, the holder may serve the intermediate point Greenville-Spartanburg, S. C., on flights carrying property and mail only which also serve the intermediate point Atlanta, Ga., and any point or points north thereof on segment "2": *Provided*, That on such flights the holder shall not discharge at Greenville-Spartanburg property or mail which was enplaned at points south thereof and shall not enplane at Greenville-Spartanburg property or mail to be discharged at points south thereof.

(6) Flights scheduled to serve two or more of the fol-

lowing points shall originate or terminate at Atlanta, Ga., or a point south thereof: Detroit, Mich.; Toledo, Columbus, Dayton and Cincinnati, Ohio.

(7) Flights serving Orlando or West Palm Beach, Fla., shall originate or terminate at a point north of Atlanta, Ga.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, [fols. 1384-1468] conditions and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective on November 29, 1958. *Provided, however,* That prior to the date on which this certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the timely filing of a petition or petitions seeking reconsideration of the Board's order of September 30, 1958 (Order No. E-13024) insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time.

The authorization herein to serve Macon, Ga., shall expire on February 1, 1952.¹

The authority in "5" above shall expire on August 11, 1954, or upon the date the temporary certificates of public convenience and necessity issued pursuant to the Board's Order Serial No. E-3085, dated July 29, 1949, otherwise cease to be effective, whichever shall first occur.²

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman, and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 30th day of September, 1958.

/s/ James R. Durfee, Chairman (seal.)

Attest:

/s/ Mabel McCart, Acting Secretary.

¹ Delta has filed an application in Docket No. 5242 for permanent authority to serve Macon, Ga.

² Delta has filed an application in Docket No. 6751 to make the above authorization permanent.

[fol. 1469] BEFORE THE CIVIL AERONAUTICS BOARD

OPINION AND ORDER GRANTING AND DENYING STAY OF EFFECTIVE DATE OF CERTIFICATES—Order No. E-13211—November 28, 1958

Served: November 28, 1958

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 28th day of November, 1958.

Docket No. 2396 et al.

In the matter of the

GREAT LAKES-SOUTHEAST SERVICE CASE

By the Board:

On September 30, 1958, we issued our decision in this proceeding (Order No. E-13024) in which, *inter alia*, we (a) extended route No. 51 of Capital Airlines, Inc. (Capital), from Pittsburgh to Buffalo and from Atlanta to Miami via various intermediate points, (b) extended route No. 54 of Delta Air Lines, Inc. (Delta), from Cincinnati to Detroit via intermediate points, (c) extended route No. 3 of Northwest Airlines, Inc. (Northwest), from Chicago to Miami via intermediate points and (d) added a new Chicago-Columbus-Dayton-Washington-Baltimore segment to route No. 1 of United Air Lines, Inc. (United). Petitions requesting reconsideration of that decision have been filed by certain of the carriers and civic parties to the proceeding.¹ Answers to the various petitions and replies have also been filed.²

¹ Petitions for reconsideration and other relief have been filed by Allegheny Airlines, Inc., Capital Airlines, Inc., Capitol Airways, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Lake Central Airlines, Inc., National Airlines, Inc., Piedmont Aviation, Inc., and United Air Lines, Inc. Petitions for reconsideration have also been filed by the City of Cincinnati, Ohio; The City and Chamber of Commerce of Columbus, Ohio; The City and Chamber of Commerce of Dayton, Ohio; the Greensboro-High Point Airport Author-

Certain of the parties include in their petitions the request that the November 29, 1958, effective date of the certificates issued pursuant to our prior order be stayed pending issuance of our order on reconsideration. However, because of the detailed matters raised in the petitions for reconsideration, it will not be possible to finally dispose of them until after November 29. Accordingly, we are acting on the requests for stay in this opinion and order. An order disposing of the petitions for reconsideration in full will be issued at a later date.

In assessing the requests for stay, we have, of course, given consideration to the petitions for reconsideration to determine the likelihood of error in our original decision. After reviewing the matters raised in such petitions, we conclude that except as specifically noted hereinafter with [fol. 1471] respect to Eastern's certificate, the parties have not made a sufficient showing of probable legal error or abuse of discretion in our decision so as to warrant that a stay be granted.³ Moreover, in this proceeding we have found that new services to Florida are immediately re-

ity; the Commonwealth of Kentucky and the Kenton County Airport Board; the Commonwealth of Kentucky, the State of Ohio and The State of West Virginia (the Commonwealth of Kentucky is an intervenor; however, it does not appear that the States of Ohio and West Virginia are parties or that they have previously appeared pursuant to Rule 14); and the Raleigh-Durham Airport Authority.

² Answers and replies were filed by Allegheny, Capital, Delta, Eastern, Lake Central, National, Northwest, TWA, United, the City and Chamber of Commerce of Atlanta, the City and Chamber of Commerce of Birmingham, Buffalo Chamber of Commerce, Charlotte; Muscle Shoals Chamber of Commerce, Pittsburgh Chamber of Commerce, Raleigh-Durham Airport Authority, the Commonwealth of Kentucky and the States of Kentucky, Ohio and West Virginia.

³ By Order No. E-13190, dated November 21, 1958, and Order No. E-13198, dated November 25, 1958, we stayed the effectiveness of the new Capital, Delta, Eastern and Northwest certificates for the period to and including December 6, 1958, for the convenience of the Second Circuit Court of Appeals in considering Eastern's and Piedmont's request for a judicial stay.

quired by the public convenience and necessity during the 1958-1959 season. We are of the opinion that these services should be put into operation at the advent of peak winter season in order to give the traveling public the full advantage thereof.⁴ This consideration, in our judgment, clearly weights the scale (except in the case of the Eastern award) in favor of a denial of the requested stay. This will afford the traveling public the advantages of the new services we have found required immediately during the 1958-1959 season.

With respect to our consideration of the petitions for reconsideration we wish to comment on certain of the matters raised by the petitions.

1. Chicago-Miami and related markets.

Delta and Eastern contest our extension of Northwest's route No. 3 from Chicago to Miami, via Atlanta and Tampa-St. Petersburg-Clearwater, contending that no need exists for a third carrier in these markets. The carriers' arguments along these lines are, in the main, repetitive of [fol. 1472] matters previously presented and considered by the Board in reaching our decision.

The carriers contend that traffic between Chicago and Miami has dropped off, that the market already has all the benefits of fully competitive service, that Delta and Eastern can satisfy the market's service needs, and that the Board has failed to consider the impact of jet service in this market. Eastern also alleges that the Board failed to consider the diversionary impact on Eastern of all the new route awards made in this case.

We have no intention of repeating here the findings specifically set forth in our opinion and in the Examiner's Initial Decision, which we adopted, as to the growth shown in the Chicago-Miami market and our conviction that it will continue to grow. Looking first to the claim that the Chicago-Miami traffic has declined in 1958, we find that the latest traffic data available from carrier reports filed with the Board show a slight decrease in certain of

⁴ We also believe that Columbus and Dayton should receive the benefits of United's new service as soon as possible.

the markets along the new Northwest route. March 1958 O & D Survey Reports data show an overall decrease of 3 percent in the traffic movement between the points Northwest will serve, as compared with the March 1957 figures.⁵ However, as indicated in our prior Opinion, this decline can be attributed primarily to the bad 1958 weather in Florida and in part to the general nationwide business recession.⁶

[fol. 1473] We are not convinced that this slight traffic decline, caused by an abnormal seasonal year and a general business recession, means the end of future growth in these markets. If we were to rescind our decision extending Northwest to Miami on the basis of this factor, we would be closing our eyes to the continuing economic development in Florida and would be concluding that the past tremendous traffic growth trend in the Chicago-Florida market had ended. Our action in extending Northwest's route rests in important part on the continuing development of Florida as one of the nation's major traffic generating areas. Nothing has been submitted to us to indicate that this long-term trend is tapering off.

In addition to the weather factor, it must be recognized that the 1958 drop-off in traffic along the new Northwest route parallels general industry-wide conditions. However, preliminary traffic data for the month of October 1958 show an increase in industry revenue passenger miles of over 4 percent over October 1957.⁷ Trunk carrier net operating income for the year ended September 1958 showed a sizeable 45 percent increase over net operating income for

⁵ Forms 2787 for March 1-14, 1958 and March 1-14, 1957. Based on Delta and Eastern sales only.

⁶ Weather Bureau reports indicate the following variations from normal Miami temperatures and rainfall:

	Jan. '58		Feb. '58		March, '58	
Temperatures:	High	Low	High	Low	High	Low
	+3	-22	+9	-22	+9	-14
Precipitation:	+3.61 in.		-0.24		+2.91	

⁷ Preliminary carrier reports to the Air Transport Association.

the year ended June 1958.⁸ These figures indicate that general industry conditions are on the upswing. We are confident this general improvement will continue and that the Chicago-Miami market will maintain its position among the very top traffic generating pairs in the country. The carriers have submitted nothing which would lead us to believe that the Chicago-Miami route traffic will not continue to grow in line with its long-term trend once the [fol. 1474] aberrations due to the 1958 bad weather and the recession have passed.

Even though the Chicago-Miami traffic leveled off in the most recent period, we do not believe our decision should be changed. We wish to reiterate one of our basic points as to the benefits of third carrier competition in a market of the size of the Chicago-Miami market.⁹ Such a market is of great economic importance to Delta and Eastern, as they allege; however, this fact in and of itself is not sufficient to insure provision of the quantity and quality of service such a large market requires if its continued growth and development are to be fostered. Despite the carriers' contentions to the contrary, it is a fact that their past services have not fully met the reasonable demands of the traveling public.¹⁰ Even though the carriers may be able to provide a full pattern of competitive service now, we believe the authorization of a third competitive carrier is necessary to insure that result. The fact that jet aircraft, with their greater seating capacity, will soon be available for use over the Chicago-Miami routes, does not negate the validity of this proposition. Whether or not

⁸ Forms 41. Certain of this increase is, of course, attributable to recent fare increases.

⁹ We detailed the comparative size of this market in our prior Opinion, p. 3. Chicago-Miami is by far the largest two-carrier market in terms of both passengers and passenger miles.

¹⁰ See Examiner's Report page 271 ff. In discussing the need for a new Chicago-Miami route via intermediate points, the Examiner cites, *inter alia*, difficulties experienced by passengers in securing space on Chicago-Florida flights, operations at abnormally high load factors, civic condemnation of available services, etc.

total flights operated over the route can be reduced as a result of the increased capacity of jet aircraft,¹¹ does not [fol. 1475] affect in any way the fact that the presence of a third competitive carrier will operate to guarantee that ample service of the highest quality is always available.¹²

Objecions have also been raised as to the inclusion of Atlanta and Tampa-St. Petersburg-Clearwater (Tampa) on the new Northwest Chicago-Miami route. However, as in the case of Chicago-Miami flights, the Examiner found that load factors on express flights between Atlanta and

¹¹ The Board has never refused to award needed new routes because of particular technological advances in the type of aircraft operated by the industry. We see no reason to change this policy now. As indicated above, the fact that the number of jet frequencies required to carry a given volume of traffic will be less than with piston engine aircraft does not affect our conclusion that a third carrier is needed to insure provision of the service we deem required between Chicago and Miami. If less jet flights are required than are now operated with conventional aircraft, honest and efficient management will dictate that the carriers operate less flights. The presence of the third competitive carrier will, however, dictate provision of enough flights to insure the market's development.

As to the economics of jet operations, this a matter which cannot be ascertained as yet from experience data. In any event, it is a matter more relevant to rate level than to the public need for new routes. The carriers have not supported their claim that our decision, made at the threshold of the jet age, violates our obligation to promote sound economic conditions in the industry. In fact, the spurs of added competition and of the attractiveness of jet aircraft should go hand in hand in insuring the full development of the Chicago-Miami traffic which we are seeking.

¹² Eastern claims we erroneously relied on beyond-area traffic which Northwest could carry in considering the need for a third Chicago-Miami route. However, without here considering the relevance of beyond-area traffic vis-a-vis the "need" issue, it is clear from our Opinion that beyond-area traffic benefits were considered only with respect to the selection of carrier issue.

Chicago and between Tampa and Chicago were operated at abnormally high levels and that additional carrier authorizations were required to bring about necessary improvements in service. The Examiner also considered the important support these points would add to the route. In our prior Opinion we adopted these findings, and noted [fol. 1476], the long-term growth trend in the Chicago-Atlanta and Chicago-Tampa markets.

In 1957, more than 52,000 passengers moved between Chicago and Atlanta. Northwest's participation in this traffic, which we are convinced will continue to grow, will strengthen its operations along the new route as well as provide additional service for the Atlanta passengers.¹³

The Examiner also found a need for improvements in Tampa-Great Lakes service. He recommended inclusion of Tampa on the third carrier Chicago-Miami route and on Delta's route No. 54. We agree. However, Eastern, which presently serves Tampa on a monopoly basis from Great Lakes cities, challenges our granting Tampa authority to both Northwest and Delta.

We believe a point such as Tampa, which generated almost 800,000 passengers in 1957—over 2200 per day, requires a full pattern of competitive service not only to meet its present needs but also to insure full development of its passenger potential. During 1957, a total of 799,097 air passengers originated or terminated at Tampa-St. Petersburg as follows:

Traffic to and from Great Lakes Area	297,089
Traffic to and from East Coast Area	211,432
Traffic to and from Florida points	176,943
All other	113,633
Total 1957 Tampa-St. Petersburg traffic	799,097

¹³The above discussion indicates our reasons for including Atlanta on the Northwest route on an unrestricted basis. We are not persuaded by Delta's petition insofar as it requests either removal of Atlanta from the route or imposition of a restriction requiring Northwest to overfly Atlanta on Chicago-Florida flights. Grant of either of these requests would unnecessarily weaken the route and interfere with needed service improvements.

[fol. 1477] Our decision herein provides either first single carrier service or first competitive service to all but a small number of the 297,089 passengers originating or terminating at cities north of Tampa which are within the boundaries of this proceeding.

Our decision to include Tampa on the Northwest route is based on a number of factors. First, the city deserves and can support competitive service to Chicago. The Examiner's finding that the quality of its service needs improvement supports this conclusion. It is also apparent that the success of Northwest's operations between Chicago and Miami rests in some part on the support to the route generated by such major intermediate points as Tampa (and Atlanta). Thus, the addition of Tampa to the route not only meets Tampa's own needs for competitive service, but also supports frequencies over the entire route. Including Tampa means more service can be operated on an economic basis between all the points on the new route, both nonstop and via intermediate points.

We are also adding Tampa to Delta's route No. 54. The Examiner found a need for competitive service from Tampa to Detroit and the other cities which Delta can serve on route No. 54. In our prior Opinion, we also concluded that the benefits of competitive Detroit-Tampa service warranted adding the point to Delta's route. Over 41,000 passengers moved between Detroit and Tampa-St. Petersburg during 1957. A market of this size, approximately 115 passengers per day, clearly warrants the added service a second carrier will provide and the benefits of the traffic which should result from this award. Adding Tampa to Delta's route not only brings competition in the Detroit market, but also in many other markets where Delta and [fol. 1478] Eastern compete in the area between the Great Lakes cities and Florida. This general evening out of the competitive pattern between Delta and Eastern in the Great Lakes-Southeast area, which we achieve in part by adding Tampa to Delta's route, has been one of our goals in deciding this case.

The carriers also object to our awards in this and in the *St. Louis-Southeast Service Case* insofar as multiple carrier competition is authorized between Atlanta and Florida points. However, as we made clear in our prior

Opinion, these authorizations were not premised on local traffic needs south of Atlanta. Rather, in this case, the Board was confronted with accommodating the needs of the Great Lakes cities for service to the Southeast, and our route extensions were accordingly drawn so as to meet these long-haul service requirements. We established, and intended to establish, a network of routes radiating out from Atlanta and Florida to the various important metropolitan centers to the north. Because these extensions were not meant to meet local Atlanta-Florida needs, we imposed certain long-haul restrictions intended to insure provision of the required long-haul service and to prohibit unnecessary additional local turnaround service.

We remain convinced that to be effective, the new carrier route extensions must serve the primary Florida tourist centers. The fact that there may be little need for additional local service south of Atlanta does not mean that the inclusion of Atlanta and the Florida points on the new route extensions is not required by the public convenience and necessity. We are satisfied that the public convenience and necessity for including these points on routes extending [fol. 1479] to such points as Chicago, Detroit, Cleveland, Pittsburgh and Buffalo has been established. Obviously, we could not justify routes from Great Lakes cities which would terminate at such points as West Palm Beach or Orlando, for example. However, including smaller Florida points on the new routes adds strength to the basic Great Lakes-Florida routes granted and conveniences those Great Lakes passengers whose ultimate Florida destination is neither Miami nor Tampa-St. Petersburg-Clearwater who would otherwise be required to make multi-carrier connections.

The carriers' claims that these multiple carrier authorizations south of Atlanta will be economically disastrous are greatly exaggerated. In the first place, it is very questionable whether the new carriers will schedule stops at each and every point from Atlanta south on their long-haul flights. They will be more interested in carrying the lucrative long-haul passengers from the Great Lakes cities on a nonstop or limited-stop basis and can be expected to carry local traffic only on an incidental by-product basis. And, of course, an examination of the markets involved on a passenger mile basis, the basis which reflects the

revenues derived from this traffic, indicates that possibilities for revenue diversion do not involve large sums. The following Table indicates the markets involved and the estimated diversion from Eastern:

[fol. 1480] Probable Diversion From Eastern Between Atlanta and Florida Points Inherent In Awards To Capital, Delta, Northwest and TWA

(Amounts in Thousands)

	1956			1958			
	Total Market	EAL Participation	EAL % of total	Total Market	Diversion ¹⁴	EAL Participation	EAL % of total
Capital							
Rpm's ¹⁵	146,601	97,055	66.2	190,581	8,756	117,415	61.6
Dollars	8,240	5,454		10,711	492	6,599	
Delta							
Rpm's	71,292	57,291	80.4	92,680	5,480	68,998	74.4
Dollars	4,007	3,220		5,209	308	3,878	
Northwest							
Rpm's	96,681	68,930	71.3	125,685	5,892	83,718	66.6
Dollars	5,433	3,874		7,063	331	4,705	
TWA ¹⁶							
Rpm's	96,681	68,980	71.3	125,685	5,892	83,718	66.6
Dollars	5,433	3,874		7,063	331	4,705	
Duplication in Awards	249,821	182,039		324,766		221,065	
Total Unduplicated							
Rpm's	161,434	110,167	68.2	209,865	26,020 ¹⁷	152,784	63.3
Dollars	9,073	6,191		11,794	1,462	7,462	

Source: Brief of Eastern to the Board

Appendix A—Delta Pairs

B—Delta Pairs

C—Capital Pairs

¹⁴ a. Applicants estimated maximum possible participation:

2nd carrier in market 40%

3rd carrier in market 20%

carriers with restrictions 10%

Cf. *Southwest-Northeast Service Case*, Order No. E-9758, November 21, 1955.

b. Probable diversion is shown as 66% of maximum possible participation, as assumed by Eastern in Appendices A, B and C to its Brief to the Board.

¹⁵ Revenue passenger miles.

[FOOTNOTES 16 AND 17 OF PAGE 67]

[fol. 1481] Thus, we estimate that in 1958, 26 million revenue passenger miles will be available to Capital, Delta, Northwest and TWA between Atlanta and points south which would be retained by Eastern in the absence of our new route awards in this area. However, Eastern's 1958 revenues from the traffic it would carry south of Atlanta (\$7.4 million) would be increased approximately 11% over 1956 (\$6.1 million). The diversion Delta might suffer due to the competition added from Atlanta south will be more than offset by its new Tampa-Chicago authorization.

It should also be noted that traffic south of Atlanta does not follow the very market seasonal fluctuation which characterizes the Great Lakes-Florida traffic.¹⁶ Thus, with the reduced number of frequencies operated by the new long-haul carriers during the off-peak season, the impact of their new authorizations in the local markets during the off-peak season will be considerably reduced.

As to local frequencies, Eastern and National will have more flights in these markets because of their several routes to Florida from various distant cities than will the new carriers. For example, Eastern and National flights operated along the dense New York-Miami route can be expected to carry a good share of this local traffic. Eastern and National will undoubtedly continue to carry the greatest proportion of the local traffic. The amount of local traffic the new carriers will take is not significant enough

¹⁶ TWA is included for the purpose of showing total probable diversion from Eastern from awards in this case and in the *St. Louis-Southeast Case*, pertaining to Atlanta-South.

¹⁷ The present participation of Delta, Eastern and National in the south of Atlanta markets has been taken into account in preparing this estimate.

¹⁸ Traffic between Atlanta, Jacksonville, Orlando, Tampa, St. Petersburg, West Palm Beach and Miami totaled 13,754 passengers in March 1957 and 9,649 passengers in September 1957. On the other hand, Chicago-Miami March 1957 passengers totaled 17,360 as against 6,717 passengers in September 1957, a 158.4 percent variation as against a 42.5 percent variation in the south of Atlanta traffic.

[fol. 1482] in our judgment to deny the new carriers the support these points will give or to deny Great Lakes passengers the benefits of single-carrier service to their ultimate Florida destination.^{18a}

Eastern's claim that the Florida extension of Northwest's route violates the Ashbacker principle (*Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945)) in the absence of simultaneous consideration of Eastern's application to extend its routes north and west of Chicago is without merit. Eastern submitted no exhibits in this case purporting to show that its application to provide service west of Chicago to the Twin Cities and beyond to the Pacific Northwest and Northwest's Chicago-Southeast application are mutually exclusive, nor did the carrier attempt, by traffic analyses or other economic studies based on the evidence of record in the proceeding, to spell out and justify by facts its claim of mutual exclusivity. Rather its approach has been merely to make the claim and by so doing to shift to the Board the burden of establishing that the applications are not in fact mutually exclusive.

Although we believe that a carrier making a claim of mutual exclusivity has the burden of establishing that the grant of one application will, as a matter of economic fact, preclude a subsequent grant of its own application, we have, nonetheless, considered this matter independently against the facts of record. That consideration convinces [fol. 1483] us that the grant of Chicago-Atlanta-Tampa/St. Petersburg/Clearwater-Miami authority to Northwest will not preclude a subsequent grant of Eastern's application for an extension of its routes west from Chicago to the Pacific Northwest. Eastern's ability to establish that the public convenience and necessity require an ex-

^{18a} Implicit in our discussion above is our conclusion that the alleged adverse effects of the multiple carrier authorizations south of Atlanta do not require us to substitute National, which does not serve Atlanta, for Capital over the Buffalo-Miami route as suggested by Delta. Our reasons for selecting Capital to provide needed services over this route are detailed elsewhere in this opinion and in our prior opinion.

tension of its routes west of Chicago will depend in large measure on whether there is a need for additional service between Chicago, Milwaukee and other points on Northwest's routes west of Chicago¹⁹ and that burden would be the same whether or not Northwest were extended to Florida.

Even to the extent that the availability of through traffic might be a factor in the decision, the presence of Northwest's Chicago-Miami service would not prevent the award. Admittedly, Miami, Tampa, and Atlanta are important traffic markets and a subsequent grant of Eastern's application would involve a duplication of Northwest's services between those three points and points on its existing route west of Chicago. However, only a glance at the airline route map will show that Eastern with its extensive route authorizations south and east of Chicago will be able to support its proposal by traffic not merely from these three points, but from a large number of additional communities located to the southeast of Chicago. Whatever the prejudice that an award to Northwest may cause [fol. 1484] to Eastern's application, the facts demonstrate beyond question that it will not preclude a later grant of that application.^{19a}

¹⁹ In this connection it should be noted that in the present case the decision to establish a third route between Chicago and the Southeast was based solely on the needs of the Chicago-Atlanta-Tampa-Miami markets. The question of through service benefits between points west of Chicago and the Southeast did not even come into the picture except as a factor in selecting the carrier to perform the Chicago-Southeast services that had been found to be required.

^{19a} As a matter of fact, Eastern will be accorded simultaneous consideration of its application to provide Twin Cities-Florida service with those of Northwest and other carriers in the pending *Chicago-Milwaukee-Twin Cities Case*, Docket No. 3207 *et al.* In fact, the Examiner in that case has found that the public convenience and necessity require authorization of one unrestricted and one restricted new Twin Cities-Miami services.

In its Brief to the Examiner, Eastern requested the Examiner (a) to reopen the record for receipt of evidence on the matter of mutual exclusivity, or (2) to rule that findings on the issue were impossible on the record or, at the least, (3) to reconsider his rulings refusing to issue subpoenas or direct production of data requested by Eastern. The Examiner had ruled that Eastern's request for load factor data related to the routes of other carriers outside the area covered by the proceeding, should be denied on grounds of relevance and materiality. Notice to All Parties, May 2, 1956. In his Initial Decision, the Examiner affirmed his prior ruling. Initial Decision p. 279. The Examiner did, however, permit carriers to show traffic flows moving to and from points beyond the area of the proceeding which would be inconvenienced by grant of a particular application and had ruled at the hearing that Eastern was permitted to explore the mutual exclusivity issue. Transcript of hearing pp. 1330-1, Initial Decision p. 4. Eastern apparently chose to cross-examine other carrier witnesses on the mutual exclusivity point rather than to make its own evidentiary presentation.

Although Eastern attempted to tie its request for these load factor data to the mutual exclusivity argument, the data which Eastern sought do not appear to us to be relevant [fol. 1485] to the issue of mutual exclusivity. In other words, we see no direct connection between Northwest's Chicago-West Coast load factors and the question whether grant of the Chicago-Miami route to Northwest forecloses grant of Eastern's Chicago-Twin Cities-West Coast application as a matter of economic fact. In any event, Eastern's failure to submit evidence on its own on the issue of mutual exclusivity, forecloses the carrier from now claiming that the record is incomplete or that it was denied a proper hearing. Also the fact that Eastern had appealed the Board's order of consolidation but that the Court's Opinion was not handed down until after the hearing in this case was concluded, did not in any way relieve Eastern of its burden of developing evidence on the mutual exclusivity issue on the record if it intended to assert this

claim at a later stage of the proceeding.²⁰ Eastern's own brief to the Examiner indicates its awareness of the Board's ruling in other cases to the effect that all carriers are free to urge mutual exclusivity on the basis of the evidence as to applications not consolidated in a particular case. Since such issues depend upon an evaluation of all pertinent facts, they cannot be resolved until the conclusion of the case. A carrier may then argue the mutual exclusivity issue from all the evidence of record, including such evidence as the carrier has introduced directed specifically to the issue of mutual exclusivity.

None of the carriers' contentions discussed above persuaded us that the Northwest route award should be stayed [fol. 1486] or that any part of our decision herein has violated the *Ashbacker* principle.

2. Capital's Buffalo-Miami route.

We turn next to the Capital route award. National contests our selection of Capital to operate the new Buffalo-Miami route, alleging that we failed to consider, *inter alia*, its greater participation in the traffic involved, its superior ability to provide the necessary service and its greater need for strengthening. However, as our Opinion made clear, we gave full consideration to these matters and to the advantages which would result from the selection of National to operate this route, but concluded that the weightier considerations pointed to the selection of Capital. We need comment on only a few of National's claims.

We recognize that on a passenger mile basis National has participated to a greater extent than has Capital in the traffic which may be expected to move over the new

²⁰ The Board's limitation of the issues to be considered in this proceeding (naming Chicago as the northwestern border point on the area to be considered) was sustained by the U. S. Court of Appeals for the District of Columbia in *Eastern Air Lines, Inc. v. C.A.B.*, 243 Fed. 2d 607 (1956).

[fol. 1487] route.²¹ However, we do not regard this factor as requiring National's selection. The great bulk of the traffic with which we are concerned, is generated at Capital's Great Lakes cities, not at points on National's system.²² Our award merely permits the originating carrier

²¹ We specifically alluded to this fact at page 21 of our prior Opinion. It should be noted, however, that Capital participates in the carriage of more Great Lakes-Florida passengers than does National, illustrated by the following table:

**Passengers Carried Between
Buffalo, Cleveland and Pittsburgh and Jacksonville, Miami, St. Petersburg, Tampa, West Palm Beach, Orlando By Capital and National**

	<i>Passengers</i>	<i>Carrier</i>
Buffalo	1874	Capital
	1558	National
Cleveland	32	Capital
	46	National
Pittsburgh	510	Capital
	360	National
Total	2416	Capital
	1964	National

Source: March 1-14, 1957 O & D Survey

²² Capital Exhibit 33 shows that 95 percent of its Great Lakes-Florida round-trip traffic was ticketed at Great Lakes points. This fact is, in our opinion, dispositive of National's claim that we looked only at the northern end of the Buffalo-Miami route in considering the matter of identity in the market. It is clear that the greater identity is with Capital, the carrier which generated the greater share of the traffic. Traffic between National's system points (Fort Myers, Sarasota, Lakeland, Wilmington, New Bern, Fayetteville, Valdosta and Marietta), on the one hand, and Buffalo, Cleveland and Pittsburgh, on the other hand, amounted to only 5590 annual passengers in 1956, whereas for the same period Capital carried over 15,500 passengers between its Michigan cities and Florida alone. Over 4,400 passengers moved between Erie and Youngstown alone, on the one hand, and Miami and Tampa-St. Petersburg, on the other, in 1956.

to carry the passengers all the way to their final destination. As indicated in our Opinion, Capital has operated with the disadvantage of a relatively short average length of passenger haul, e.g. carrying Great Lakes cities passengers to either Washington, Atlanta or Pittsburgh for connections on to Florida. Since this traffic is Capital-generated traffic, we believe Capital must be considered as having the greater historic interest in it.

We previously considered the comparative abilities of the two carriers to operate the Buffalo-Miami routes, their comparative "need for strengthening"²³ and the diversionary impact of selecting one carrier over the other. Although National reargues these matters, the carrier has not shown us to be in error in these regards or with respect to our primary conclusion that the selection of National would result in serious unwarranted diversion of local traffic in the heart of Capital's system (Norfolk-Washington-Pittsburgh-Cleveland-Buffalo) and of Capital's Great Lakes-Florida traffic. For this Capital-generated traffic to be given over to a carrier not identified in its area of generation would be untenable. As to National's comparative diversion argument, it is, of course, certain that the Capital extension will result in the diversion of some traffic which National would otherwise carry. The traffic is principally that which moved over the Capital-National interchange via Washington. We recognized National's interests in this traffic in our prior Opinion; however, we concluded that the overall benefits to be derived from our selection of Capital, would more than outweigh the loss of this traffic by National.²⁴

²³ National's claim that we did not mention its "need for strengthening" in discussing the Buffalo route overlooks our explicit recognition that "National's route system could well be strengthened" in connection with our discussion of Northwest's Chicago-Miami award at page 10 of our prior Opinion. In reaching our decision herein, we recognized National's need for route strengthening and gave Capital no preference for selection on the basis of "need for strengthening".

²⁴ The Buffalo-Miami route is not sufficiently dense to warrant grant of National's alternative request that it be authorized to serve the route in addition to Capital.

Eastern also requests us to specifically rule on certain matters affecting Capital's fitness set forth in its "Amendment of Motion to Reopen The Record", dated May 2, 1958. In that document Eastern alleges that Capital attempted [fol. 1489] to inform the Board of certain new equipment acquisition plans on an *ex parte* basis. We considered Capital's fitness and its new service proposals in this case on the basis of the carrier's own presentation of record and on the basis of equipment presently owned and operated, as is clearly indicated at page 25 of our prior Opinion. No new Capital equipment arrangement was before us in this case and our deliberations were guided only by the record evidence.²⁵

It is true that word of a Capital equipment acquisition arrangement came to us prior to our decision in this case. On January 27, 1958, we received a teletype message from General Dynamics Corporation stating that it had entered into an agreement with Capital covering the sale of 15 Convair 880 aircraft and undertaking, on notice from Capital, to arrange for leasing to Capital of up to ten 1049H Constellation aircraft pending delivery of the 880's. By letter of February 12, 1958, the Board asked Capital to submit a copy of the agreement to the Board since it raised a question as to the existence of a section 408 control relationship between Capital and General Dynamics. By letter of February 14, 1958, Capital submitted a copy of the agreement to the Board. Since the agreement was not final and the undertakings of the parties were not definite, the Board informed Capital, by letter of March

This would mean two carriers between Buffalo and Florida and three carriers from Pittsburgh and Cleveland. We are unable to find that such multi-carrier authorizations are required in these markets at this time. We have also considered Eastern's arguments relative to an extension to Buffalo and to a connection of its Washington and Pittsburgh authorizations but find that nothing therein should cause us to alter our decision to extend Capital's route to Buffalo and Miami and to deny a stay of the effectiveness of Capital's amended certificate.

²⁵ Eastern also asserts that private discussions were held between Board Members and a high executive of General Dynamics Corporation. No such discussions took place.

7, 1958, that a determination whether section 408 was or was not involved could not be made. It was therefore suggested that Capital and General Dynamics consult the staff [fol. 1490] when the arrangement had been finalized to consider whether the Act requires the filing of an application and prior approval of the arrangement by the Board before its terms could become effective. Board records do not indicate that such contacts with the staff have been made or that a final agreement has been filed.

Even though we were aware of the Capital-General Dynamics negotiations from trade press reports and from the exchange of correspondence referred to above,²⁶ this factor, not of record in this case, did not affect our decision in any way. As was made abundantly clear in our Opinion, the selection of Capital to operate the new Buffalo-Miami route was based on factors in favor of its selection which outweighed to a considerable degree the claims of other carriers to the route.^{26a}

We are satisfied that the effectiveness of the amended certificate authorizing Capital to operate a Buffalo-Miami route should not be stayed.

3. Diversion from Eastern.

We turn now to Eastern's claim that we did not fully consider the cumulative diversionary impact of our awards in this case on Eastern in reaching our conclusions herein. The following table indicates that Eastern's financial position will not be seriously affected by our awards in this case.

²⁶ Capital points out in an answer to Eastern's May 2 filing that most of the details of its arrangement with General Dynamics were publicly stated in testimony and exhibits in the *General Passenger Fare Investigation*, Docket No. 8008.

^{26a} We have considered Eastern's contentions but cannot conclude that Capital's conduct in regard to this matter renders it unfit to receive the Buffalo-Miami award.

[fol. 1491] Probable Diversion from Eastern Inherent in Authorizations to Capital, Delta and Northwest in Great Lakes Case

(Amounts in Thousands)

	1956			1958			
	Total Market	EAL Participation	EAL % of total	Total Market	Diversion ²⁷	EAL Participation	EAL % of total
Capital Rpm's	370,721	321,175	86.6	481,937	85,673	331,854	68.9
Dollars	20,835	18,050		27,085	4,815	18,060	
Delta Rpm's	560,561	528,998	94.4	728,729	145,774	541,924	74.4
Dollars	31,504	29,730		40,955	8,192	30,456	
Northwest Rpm's	708,123	479,487	67.7	920,560	76,343	546,978	59.4
Dollars	39,797	26,947		51,735	4,290	30,740	
Duplication	256,581	216,550		332,136		254,083	
Total							
Unduplicated	1,382,824	1,113,110	80.5	1,799,090	307,790	1,166,673	64.8
Dollars	77,715	62,557		101,109	17,298	65,567	

[fol. 1492] Thus, we estimate that in 1958 Eastern will receive almost \$66 million in revenues from the routes over which competition is being added in this case as compared with the \$63 million it received from these routes in 1956. Capital, Delta and Northwest will, in our judgment, share \$17 million in future revenues which in the absence of our awards herein would be available to Eastern.²⁸ It should be made clear that we are here discussing potential revenues which Eastern must share with the new competitive carriers. Our table indicates that even though Eastern will not participate in the affected markets to the same extent (100% in certain cases) it has in the past, Eastern

²⁷ Estimated on same basis as the table on page 12 above. The \$7.4 million diversion figure referred to in our prior Opinion (p. 8) as Eastern's diversion estimate adjusted to conform to the Chicago-Miami route we are authorizing, was not adjusted to reflect the participation factors we have used in making our estimates. The participation factors we have used differ from those assumed by Eastern in its estimate.

²⁸ If course, Eastern would not take all the increase in the Chicago-Miami market which Delta also presently serves.

will still continue to carry a greater share of the traffic in these markets than will its competitors.²⁹ It should also be noted that the \$17 million figure refers to gross revenues and clearly does not mean that Eastern's profits will be affected in that amount.

The diversion estimate is also subject to downward adjustment because the traffic estimate used in the table above does not include the growth over and above normal growth which we would expect in those markets which Eastern has been serving as a monopoly carrier. Thus, as to Capital's new authorizations, 69 percent of the total passenger revenue included in the table, is, by Eastern's own figures, derived from monopoly markets.³⁰ The same is true as to [fol. 1493] Delta's new authorizations.³¹ Eighty percent of the revenue that we estimate Delta would divert from Eastern is derived from what are now Eastern monopoly markets. Thus, we believe the actual dollar diversion which Eastern will experience will be offset by the added growth due to the spur of competitive service in these markets in which Eastern will share.

The foregoing analysis indicates to us that the overall impact of our awards herein will not seriously affect Eastern. We estimate that Eastern will receive more revenues in 1958 from these markets than the carrier received in 1956. Eastern will not, however, be the sole beneficiary of expected traffic growth.

4. Petition of Piedmont.

Piedmont Aviation, Inc. (Piedmont), has challenged certain aspects of (a) our extension of Eastern's route No. 6

²⁹ General carrier experience indicates that newly authorized carriers do not share available traffic on an equal pro rata basis with existing carriers already established in the market.

³⁰ For example, Capital will now participate in the following markets in which Eastern has been the monopoly carrier: Cleveland-Florida and Pittsburgh-Florida.

³¹ For example, Delta will now participate in the following markets in which Eastern has been the monopoly carrier: Indianapolis-Florida, Louisville-Florida and Tampa-Chicago.

from Charleston, W. Va., to Cincinnati and Chicago, and (b) the addition of Louisville, Indianapolis and Dayton to Delta's route No. 54.³² The carrier requests the Board to amend Eastern's certificate to eliminate Chicago and Cincinnati from Eastern's route No. 6 and, if found required, to add Cincinnati on Eastern's route No. 10 to Chicago; or to extend route No. 6 to Cincinnati and Chicago from Columbia, S. C., or a point south thereof and to Chicago from Charlotte and/or Raleigh-Durham or a point south thereof. [fol. 149] Piedmont also asks the Board to eliminate the Eastern route No. 6 extension between Raleigh-Durham and Greensboro-High Point, and to prohibit Delta from providing one-plane service between Lexington and Asheville on the one hand and Louisville, Indianapolis and Dayton on the other. Piedmont argues that the scope of the issues in this case, the evidence of record, *Ashbacker* considerations and sound discretion require that the Chicago extensions be made in the form it suggests. The carrier's contentions, insofar as immediate impact on its present system operations is concerned, are primarily pointed to the diversion Piedmont would suffer as a result of new services Eastern could provide under its new authorization between Cincinnati on the one hand and such points as Raleigh-Durham, Greensboro-High Point, Winston-Salem, Roanoke and Charleston, W. Va., on the other.

We have considered Piedmont's contentions and have concluded that serious questions are raised concerning the scope of the issues in the proceeding, mutual exclusivity, and exclusion of evidence by the Examiner. In considering the question of stay we note also that because of a strike of some of its employees Eastern in any event is presently unable to inaugurate service on this route, and thus will not be injured to any great extent by a stay at this time. Accordingly, we have concluded that any service Eastern may be planning in these markets should be postponed until we have fully considered the matters raised in Piedmont's petition for reconsideration. Our action is without prejudice to the right of Eastern to seek modification of

³² Piedmont has requested the Board to stay the effectiveness of certain aspects of the new Eastern route No. 6 certificate.

this stay to permit the operation of services which will not cause injury to Piedmont.

[fol. 1495] 5. Miscellaneous matters.

Two final matters. Eastern questions the legality of our decision because of the press release procedure followed in announcing our tentative vote on the issues in this proceeding.³³ There is no validity to this claim nor has Eastern shown how it has been harmed in any way by this procedure.³⁴ Cf. *New York-Florida Case*, Order No. E-10884,

December 21, 1956.

We have fully considered the other matters raised by the parties with respect to the amended Capital, Delta, Northwest and United certificates. We have considered the various carrier contentions insofar as they involve arguments that carriers other than Capital, Delta or United should receive certain of the new authorizations we have granted, arguments that presently authorized carriers can adequately provide service in markets where we have authorized new competitive service, and arguments as to Capital's fitness; however, we do not find that any of the contentions should cause us to further delay the effectiveness of the certificates issued to these carriers pursuant to our prior Opinion.

In view of all the foregoing we conclude that, except with respect to Eastern's certificate, the requested stays should not be granted. In the interim, the Board will address itself to the merits of the petitions for reconsideration, and our order dealing with these matters will issue at a later date. [fols. 1496-1508] To the extent that we have considered the petitions for reconsideration in the present order we have done so only for the purposes of assessing the probability

³³ Press Releases dated March 26 and March 31, 1958.

³⁴ Eastern asks that the minutes of the Board's meetings at which the issues in this case were considered be made public. By separate communication dated November 17, 1958, we advised Eastern that it could inspect the minutes in question. At the same time we advised Eastern that no Bureau of Air Operations staff members were present during our deliberations.

of error in our original decision. We feel that such action is necessary to a fair consideration of the stay requests, and is in no way prejudicial to the legal rights of those parties seeking reconsideration. Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits.

Accordingly, It Is Ordered:

1. That the effectiveness of Eastern's amended certificate for route No. 6, issued pursuant to Order No. E-13024, September 30, 1958, be and it hereby is stayed pending further order of the Board.

2. That, subject to the provisions of paragraph 1 hereof and of Order No. E-13190, the requests for stay of the effectiveness of the certificates issued pursuant to Order No. E-13024³⁵ be and they hereby are denied.

Durfee, Chairman, Denny and Hector, Members of the Board, concurred in the above opinion and order. Gurney, Vice Chairman, filed the attached concurrence and dissent. Minetti, Member, did not take part in the decision.

/s/ Mabel McCart, Acting Secretary. (Seal.)

³⁵ TWA's new certificate for route No. 2 was issued pursuant to the orders in this case and in the *St. Louis-Southeast Service Case*. The certificate has been temporarily stayed pursuant to action in the *St. Louis Case* and is not affected by our action herein.

[fol. 1509] BEFORE THE CIVIL AERONAUTICS BOARD

SECOND SUPPLEMENTAL OPINION AND ORDER ON RECONSIDERATION—Order No. 13835—May 7, 1959

Adopted by the Civil Aeronautics Board at its office in Washington, D. C.; on the 7th day of May, 1959

Docket No. 2396 *et al.*

In the matter of the

GREAT LAKES-SOUTHEAST SERVICE CASE

Extensive petitions for reconsideration have been pending before the Board since our original decision in the above-entitled proceeding, Order No. E-13024, dated September 30, 1958. Subsequent orders have disposed of requests for stay and for changes in limited phases of our original decision.¹ We now address ourselves to the merits of the petitions for reconsideration, particularly insofar as they attack the basic authorization of Northwest to operate a Chicago-Miami route; of Delta to operate a Detroit-Miami route; of Capital to operate a Buffalo-Miami route; of United to operate a Chicago-Dayton-Columbus-Washington route, and the denial of competing applications to provide service over these routes. These questions were considered heretofore when we disposed of earlier requests for stay, and extensive findings were contained in our order covering the stay matter.

Upon full consideration of the petitions for reconsideration, we find that the findings and discussion in our Order denying the requests for stay fully and adequately express our conclusions with respect to the requests for reconsideration of those awards. Accordingly, we affirm our findings in Order No. E-13211 and incorporate them herein by this reference insofar as pertinent to our denial of the peti-

¹ Opinion and Order Granting and Denying Stay of Effective Date of Certificates (Order No. E-13211, dated November 28, 1958); Opinion and Order Lifting Stay and Amending Certificate (Order No. E-13526, dated February 18, 1959); Supplemental Opinion and Order on Reconsideration (Order No. E-13728, dated April 10, 1959).

tions for reconsideration of our award of Northwest's Chicago-Miami route, Delta's Detroit-Miami route, Capital's Buffalo-Miami route and United Chicago-Washington route. We believe nothing further need be added with respect to our disposition of these issues.²

1. There are, however, a number of certificate restriction matters which warrant consideration. First, Allegheny requests the Board to prohibit Capital from providing local service over amended route No. 51 between Erie and Cleveland. The carrier argues that the Erie-Cleveland situation is similar to that between Buffalo and Cleveland where [fol. 1511] the Board imposed such a restriction. With respect to Buffalo-Cleveland, the Board noted that a substantial question had been raised as to whether any application for such a service had been actively prosecuted in the proceeding, and that the local market was not of the long-haul type essentially in issue in the case. We concluded that the imposition of the requested restriction was warranted. We now find that the same basic considerations apply with respect to Erie-Cleveland and conclude that Capital's authority in this market should be restricted to prohibit the carrier from engaging in air transportation in this market, but allowing the carrier to serve both points on the same flight to the southeast as requested by Allegheny. It seems

² Included are such matters as Eastern's applications to extend route No. 10 from Louisville to Detroit, to serve Atlanta on route No. 6 and to connect its east coast route No. 6 segment with Buffalo and Pittsburgh; Capital's request to operate between Miami, on one hand, and certain points north and west of Cleveland, on the other; Capitol Airways' certificate application, etc. We have considered and reject Capitol's contention on reconsideration that it was deprived of a fair hearing by reason of the fact that certain members of Congress who appeared at oral argument urged the selection of Northwest for the Chicago-Florida route for which Capitol was also an applicant. The appearance of Congressmen in oral argument is governed by Rule 14 of our Rules of Practice which was promulgated in furtherance of sections 401(e) and 402(d) of the Act. The appearances here were fully in compliance with our Rule as it has been interpreted since its inception.

clear that the restriction will not adversely affect Capital's long-haul operations. At the same time, the restriction will protect Allegheny in one of its more important markets.

2. We also agree with Lake Central's request for imposition of long-haul restrictions on Delta's flights over route No. 54 between Louisville and certain points to the north. Thus we will amend Delta's certificate to provide that flights providing service between Chicago and Indianapolis, Indianapolis and Cincinnati, Indianapolis and Louisville, and Cincinnati and Louisville, shall originate or terminate at Atlanta or a point south thereof. We added Louisville and Indianapolis to Route No. 54 to provide those cities with competitive long-haul service over Delta's Chicago-Miami route. In the present instance Lake Central has applications under consideration in the *Great Lakes Local Service Case*, Docket No. 4251 *et al.*, which seek the addition of Louisville to its system. There are also involved [fol. 1512] in that proceeding issues which could result in improved less restricted Lake Central service between Chicago, Indianapolis and Cincinnati. Accordingly, we have decided that the long-haul restrictions mentioned above should be imposed at the present time subject to further consideration, simultaneous with our decision in the *Great Lakes Local Service Case*, of whether the restrictions should be continued after final decision in the *Great Lakes Local Service Case*. By this course of action, we are preserving now the distinction between the types of service to be provided by major regional trunks and local service carriers. If, after deciding the issues presented in the *Great Lakes Local Service Case*, we conclude that the long-haul restrictions are not required, we will have full freedom to remove them at that time. Meanwhile we cannot envisage these restrictions having any adverse effect on Delta's long-haul route No. 54 operations, whereas they will deter provision by Delta of the local turnaround service usually associated with local service carrier operations.

3. Substantially similar questions have been raised by Piedmont's request for prohibition of single-plane service between Asheville and Lexington, on the one hand, and Dayton, Indianapolis and Louisville, on the other hand. Piedmont presently serves Louisville-Asheville and Louisville-

Lexington, and the addition of Louisville to Delta's route No. 54 permits Delta to compete in these markets. Here again we have no intention of permitting Delta to provide competitive turnaround service in these local markets, and accordingly will require the carrier to originate and terminate its flights in these markets at Atlanta or a point [fol. 1513] south thereof. We believe that such a long-haul restriction is amply protection for Piedmont and that a prohibition against single-plane service is not required. Such a prohibition could result in reducing the affected cities' volume of long-haul service.

A somewhat different situation is presented with respect to Piedmont's request for protection in the markets between Lexington and Asheville, on the one hand, and Dayton and Indianapolis, on the other hand. Piedmont is applying for authority to serve Dayton and Indianapolis in the *Great Lakes Local Service Case*. As in the Lake Central-Louisville case discussed above, we believe long-haul restrictions should be imposed now, but subject to their possible withdrawal at the time of decision in the *Great Lakes Local Service Case*.

4. United has requested us to lift the certificate restriction requiring its flights between Chicago and Columbus, Chicago and Dayton, and Dayton and Columbus to serve both Chicago and Washington. Columbus and Dayton support this request. We have concluded, however, that these petitions should be denied. Our grant to United of the new Chicago-Washington segment via Dayton and Columbus was based on the need for Dayton-Columbus service to Washington and Chicago, and the restrictions imposed insure provision of that service. Our award was not based upon the need of the Ohio cities for services west of Chicago, although our selection of United took cognizance of the fact that United could provide improvements in this regard. West of Chicago service is not precluded by our award to United, and, of course, TWA provides the Ohio [fol. 1514] cities with single-plane service west of Chicago. By allowing our original decision to stand, we will insure a full pattern of service between Washington, on the one hand, and the Ohio cities, on the other hand. We recognize that the market between the Ohio cities and Chicago is substantially greater than the market to Washington; however,

the primary need to which United directed its case was that between the Ohio cities and Washington and Chicago. It was to meet that need that the Board certificated United to serve Columbus and Dayton, and the restrictions imposed on that authorization merely insure provision of the service intended.

5. It has been suggested that the Buffalo-Florida route awarded to Capital should be split into two routes, with National receiving Buffalo-Pittsburgh Southeast rights, and Capital retaining Buffalo-Cleveland Southeast rights. In this fashion both carriers would be successful applicants, but we believe the public would be the loser. We cannot overlook the fact that the Buffalo-Florida market is of limited size, and in order to command nonstop service to Florida on an economic basis, must offer sufficient traffic to support nonstop frequencies. It is our judgment that the authorization of two nonstop carriers at this time would so dilute the market as to interfere with the provision of the nonstop service on an economic basis.³ Since Buffalo is the northern terminal of the route in question, it must depend entirely on traffic explaining or deplaning at Buffalo to support nonstop frequencies and cannot look to "beyond" or so-called "back-up" traffic to sustain nonstop services. By allowing only one carrier to provide Buffalo-[fol. 1515] Southeast nonstop service, there is a much better prospect that the public will receive nonstop service to the Southeast at reasonable hours and in reasonable relationship to the available traffic. If and when one carrier fails to meet the service needs of the market, there will be ample time to remedy the situation.⁴ In the meantime, Capital should be permitted to exploit the full potential of the market until there is a showing that a second carrier is needed.⁴

³ Cf. *Dallas to the West Service Case*, Docket No. 7596, Order No. E-13503, decided February 11, 1959, where competitive service was authorized for Amarillo and Lubbock where the monopoly carrier failed to provide a full pattern of nonstop service.

⁴ Reference has been made to our recent award of competitive service in the *St. Louis-Southeast Service Case*, Docket No. 7735 *et al.*, Order No. E-13026. The St. Louis-

Aside from nonstop service for Buffalo, the availability of both Pittsburgh and Cleveland as intermediate points to support the Buffalo route will give further assurance that Buffalo will receive a full pattern of service to the Southeast in the form of one-stop services augmenting the non-stops. By the same token, Buffalo traffic will lend support to the frequencies that Capital will be able to offer between Cleveland or Pittsburgh and the Southeast, in competition with Eastern. We cannot overlook the fact that a new carrier entering the Cleveland and Pittsburgh-Florida markets for the first time, in competition with Eastern faces a major [fol. 1516] task in rendering effective competition. We think that more vigorous competitive service will be insured if Capital retains the entire route as originally awarded.

The Board has considered the various other matters raised by the parties in their petitions for reconsideration but has concluded that they do not warrant any further change in our prior decision or indicate that our prior decision was in error. Accordingly, except as granted herein, the petitions for reconsideration and other relief will be denied.⁵

Miami/Tampa/St. Petersburg market involved is larger than the Buffalo-Miami-Tampa-St. Petersburg market. In any event, however, the factual situations in the two cases are distinguishable as indicated in our opinions in the two cases. Moreover, the certification of competitive service does not merely depend upon number of passengers available, but turns upon many factors comprising public convenience and necessity, including the calibre of the services heretofore provided, the extent to which the potential has been tapped, the effect that particular proposals will have on the route structure, and the like.

⁵ As an adjunct to the argument that our Press Release policy is unlawful, it has been said that we "review the evidence and make findings and conclusions by means of a delegated opinion-writing process after the decision in a case has already been made public." These characterizations of our decisional process simply do not accord with the facts. As previously explained (Order No. E-10884, dated December 21, 1956) our press release is not a decision of the Board. And by no stretch of the imagination do we delegate the responsibility for the findings we make to sup-

It is ordered:

1. That amended certificates of public convenience and necessity in the forms attached hereto be issued to Capital Airlines, Inc., for route No. 51 and to Delta Air Lines, Inc., for route No. 54;

2. That said certificates shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal [fols. 1517-1585] of the Board attested by the Secretary and shall be effective on the date of this order;

3. That the application of Delta Air Lines, Inc., in Docket No. 7530, insofar as it requests unrestricted authority to engage in air transportation between Chicago, Ill., and Indianapolis, Ind.; Indianapolis, Ind., and Cincinnati, Ohio; Indianapolis, Ind., and Louisville, Ky.; Indianapolis, Ind., and Lexington, Ky.; Indianapolis, Ind., and Asheville, N.C.; Dayton, Ohio, and Lexington, Ky.; Dayton, Ohio, and Asheville, N. C.; Cincinnati, Ohio, and Louisville, Ky.; Louisville, and Lexington, Ky.; and Louisville, Ky., and Asheville, N. C., be and it hereby is deferred for contemporaneous decision with the *Great Lakes Local Service Investigation*, Docket No. 4251 *et al.*;

4. That except to the extent granted herein, or in previous orders in this proceeding, all petitions for reconsideration and for other relief be and they hereby are denied.

Durfee, Chairman, and Denny, Member of the Board, concurred in the above opinion and order. Gurney, Vice

port our decisions. The opinions of the Board setting forth its findings are signed by each Board Member subscribing to the opinion and are intended to reflect, as the statute contemplates, the reasons for the Board's action. The mere fact that the Board has available for its assistance, an Opinion Writing Division to perform such tasks as are assigned to it, does not derogate from the integrity of our decisions any more than does any other technical assistance which the Board obtains from its own personal assistants or other Bureaus of the Board. The findings which this Board issues speak for the Board Members who sign them and are the responsibility of those Board Members alone.

Chairman, and Hector, Member, filed the attached separate concurring and dissenting statements. Minetti, Member, did not take part in the decision.

/s/ Mabel McCart, Acting Secretary. (Seal.)

[fol. 1586] IN THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 25,852

DELTA AIR LINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

LAKE CENTRAL AIRLINES, INC., et al., Intervenor

On Petition for Review of Orders of the Civil Aeronautics
Board

Additional Joint Appendix

[fol. 1587] BEFORE THE CIVIL AERONAUTICS BOARD

Docket No. 2396, et al.

In the matter of the

GREAT LAKES-SOUTHEAST SERVICE CASE

PETITION OF LAKE CENTRAL AIRLINES, INC. FOR RECONSIDERATION OF ORDER NO. E-13024 AND CONDITIONAL MOTION FOR EXTENSION OF EFFECTIVE DATE OF AMENDED CERTIFICATE FOR ROUTE NO. 54—Received October 31, 1958

Comes now Lake Central Airlines, Inc. ("Lake Central") through its attorney of record and petitions the Board for reconsideration of its opinion and order (No. E-13024) in the above proceeding served October 2, 1958, in the following respects and for the reasons stated:

1. The Board at pages 36, 42, 43, 47 and 48 of its opinion, and in the amended certificates issued pursuant to Order No. E-13024, took care to restrict the authority of some

of the trunklines awarded extensions in this proceeding so as to protect the local services being provided by Lake Central in the Great Lakes area. At page 36 of the opinion, the Board stated that Capital's amended authorization for route No. 51 would be subjected to a long-haul restriction designed to protect Lake Central's Buffalo-Youngstown and Erie-Youngstown services. At page 42 the Board, while lifting TWA's restriction against serving Cincinnati and Indianapolis on the same flights, imposed a restriction requiring that such service be provided only on long-haul flights in order to prevent TWA from operating service between Cincinnati and Indianapolis "directly competitive with Lake Central." At pages 42 and 43 of the opinion, the [fol. 1588] Board spelled out its reasons for restricting United's new authority between Chicago, Dayton, Columbus and Washington, permitting such service to be provided only on a long-haul basis so as to "limit the impact of needed long-haul services on the local service carrier operating in the area." The Board spoke at page 43 of its opinion of "the requirements of the subsidized local service carriers for protection against undue diversion."

2. In other portions of its opinion the Board:

(a) imposed a long-haul restriction on the services to be provided by Delta on the extension of its route No. 54 from Cincinnati to Detroit via Dayton, Columbus and Toledo and stated that "The need for turnaround local service operations in these markets will be the subject of direct inquiry in a new investigation being instituted contemporaneously herewith in the *TWA Cincinnati-Detroit Route Transfer Case*" (pages 40, 46) and

(b) imposed a long-haul restriction on the services to be provided by Eastern on the extension of its route No. 6 from Charleston to Cincinnati and Chicago, in order to protect Piedmont's local traffic (pages 40-41, 46).

3. Lake Central has no objection to any of the aforementioned restrictions and heartily agrees with the Board's reasons for imposing them.

4. In the light of the Board's policy, as expressed in the foregoing actions, of protecting the local service traffic of Lake Central, Piedmont and Allegheny from diversion, Lake Central believes that the Board's failure similarly

to restrict Delta's authority in its certificate for route No. 54 so as to protect other Lake Central traffic was entirely an oversight on the Board's part.

5. Specifically, the Board added Indianapolis to Delta's route No. 54 as an intermediate point between Chicago and [fol. 1589] Anderson-Muncie-New Castle. The next intermediate point south of Anderson-Muncie-New Castle on route No. 54 is Cincinnati. Since Delta does not provide service to Anderson-Muncie-New Castle, its service pattern will actually involve a duplication of two Lake Central segments: Chicago-Indianapolis and Indianapolis-Cincinnati.

6. Chicago-Indianapolis is a short-haul market only 162 miles in length now served by three carriers: American, Eastern and Lake Central. Neither Chicago nor Indianapolis appeared in this proceeding and neither therefore urged the certification of *any* additional service—either between Chicago and Indianapolis or between Chicago or Indianapolis and points south of Indianapolis. Delta's own exhibits and briefs do not show any need for additional service between Chicago and Indianapolis. The failure of the Board to impose a long-haul restriction on Delta's service between Chicago and Indianapolis is therefore clearly an inadvertent omission, and Lake Central requests that such a restriction be imposed by the Board on reconsideration.

7. Indianapolis-Cincinnati is an even shorter haul market of only 98 miles which, prior to the Board's present decision, was authorized to receive service from only American and Lake Central. In its decision which accompanied Order No. E-13024, the Board permitted TWA to serve Cincinnati and Indianapolis on the same flights, but in order to protect Lake Central's local traffic in this market, made TWA's service subject to a long-haul restriction. TWA has been certificated to serve Indianapolis and Cincinnati on its route No. 2 for many years; it did not object to the imposition of the long-haul restriction which the Board placed on its authority at the urging of Lake Central. Clearly, if TWA, which has been certificated into both cities for many years, is to be subject to such a restriction, Delta—a newcomer—should not escape a similar restriction. A reading of Delta's exhibits and briefs shows [fol. 1590] that Delta did not base its case for the addition

of Indianapolis to route No. 54 upon any alleged need for additional local service between Indianapolis and Cincinnati. Indianapolis did not take part in the proceeding and Cincinnati, which did, nowhere took the position that additional local service was required in the Indianapolis-Cincinnati market. Lake Central submits, therefore, that the Board should on reconsideration further amend Delta's certificate for route No. 54 so as to subject its flights between Indianapolis and Cincinnati to a long-haul restriction. Again, it would appear from the Board's action in imposing a long-haul restriction on TWA's flights in this market that the Board's failure similarly to restrict Delta's authority was clearly an inadvertent omission.

8. The Board also added Louisville to Delta's route No. 54 as an intermediate point between Cincinnati and Lexington. This addition, without appropriate restrictions, would permit Delta not only to operate turnaround service between Louisville and Cincinnati, but also—with the exercise of its skip-stop authority—to provide nonstop Louisville-Indianapolis and Louisville-Chicago services. As heretofore stated, neither Chicago nor Indianapolis appeared in this proceeding, hence there is no expression in this record of any interest on the part of either city in additional local service to Louisville. The Board's opinion indicates (page 5) that Louisville was added to Delta's route No. 54 so as to give Louisville a competitive service to Florida and the Southeast and to Detroit. The Board also took cognizance at page 30 of its opinion of the fact that the question of service in the Louisville-Detroit local market is an issue to be considered in the proceeding which the Board concurrently instituted in Docket No. 9891, from the *TWA Cincinnati-Detroit Route Transfer Case*.

There are in issue in the *Great Lakes Local Service Investigation*, Docket No. 4251, *et al.*, proposals to provide [fol. 1591] local service between, *inter alia*, Louisville and Cincinnati, Louisville and Indianapolis, Louisville and Dayton, Louisville and Columbus, Louisville and Toledo, and Louisville and Detroit. Lake Central's proposal to serve the Louisville-Cincinnati segment is an integral part of its proposal to provide much-needed service between Evansville and Cincinnati—a service need which the Board indicated in its decision in the *Eastern Air Lines Route*

Consolidation Case, Docket No. 3292 et al., would be considered in the *Great Lakes Local Service Investigation*. These are all local markets in the same sense that the markets between Cincinnati and Detroit on the extension of Delta's route No. 54 are local markets. The Board should not by its action in the present proceeding prejudice the disposition of the applications pending in the *Great Lakes Local Service Investigation* or foreclose itself from providing, in the latter proceeding, true local service for these local service markets. To the extent that the *local service* aspects of the trunkline applications in this case involve the same services as are proposed by the local service carriers in the *Great Lakes Local Service Investigation*, Lake Central is of the opinion, as was stated at page 7 of its brief to the Board, that comparative consideration is required under the Ashbacker doctrine. Lake Central therefore urges that the Board further amend Delta's certificate for Route No. 54 so as to require that any services it operates between Louisville and any point or points north thereof on either the Cincinnati-Chicago segment or the Cincinnati-Detroit segment of route No. 54 shall be by flights which originate or terminate at Atlanta or a point south thereof.

9. The amended certificate for route No. 54 issued to Delta pursuant to Order No. E-13024 will become effective on November 29, 1958, unless such effective date is extended by the Board. Lake Central hereby requests that if it shall appear to the Board that its decision on this and other petitions for reconsideration cannot be published [fol. 1592] and served upon the parties, including Lake Central, at least five working days prior to November 29, 1958, the Board enter an order postponing the effective date of such amended certificate. This postponement is deemed essential to permit Lake Central to determine in the light of the Board's action on its petition for reconsideration what action, if any, it should take.

Wherefore, Lake Central requests that the Board reconsider its opinion and order No. E-13024 in the respects named above and, upon reconsideration, amend the certificate of Delta for route No. 54 so as to provide (a) that flights scheduled to serve Chicago and Indianapolis or

Indianapolis and Cincinnati shall originate or terminate at Atlanta, Georgia, or a point south thereof; and (b) that flights scheduled to serve Louisville and any points or points north thereof on either the Cincinnati-Chicago segment or the Cincinnati-Detroit segment of route No. 54 shall originate or terminate at Atlanta or a point south thereof. Lake Central also requests that the Board grant the request contained in Paragraph No. 9, supra, with respect to a stay of Order No. E-13024 and the effective date of Delta's amended certificate for route No. 54 on the conditions set forth in Paragraph 9. Lake Central requests such other and further relief as to the Board may appear appropriate and in the public interest or required by the public convenience and necessity. If further argument is ordered by the Board in this proceeding, Lake Central respectfully requests the privilege of presenting argument in support of this petition for reconsideration. Likewise, if the record in this proceeding is reopened for the purpose of receiving additional evidence with respect to any issue, and providing the relief requested in this petition is not granted, Lake Central respectfully requests the opportunity to present evidence on such reopened record in support of its objections as set forth in this petition for reconsideration.

Respectfully submitted, Lake Central Airlines, Inc.,
By: /s/ Albert F. Grisard, Attorney.

October 31, 1958.

[Certificate of Service.]

BEFORE THE CIVIL AERONAUTICS BOARD

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 21st day of November, 1958

Docket No. 2396 et al.

In the Matter of

GREAT LAKES-SOUTHEAST SERVICE CASE

Docket No. 3051 et al.

In the Matter of the

NEW YORK-FLORIDA CASE

ORDER No. E-13190—November 21, 1958

Our Order E-13024 awarded various certificates of public convenience and necessity to various air carriers to become effective on November 29, 1958. It appears that Eastern Air Lines, Inc. has filed with the United States Court of Appeals for the Second Circuit petitions for review and for stay pending review of certain awards to Capital Airlines, Inc., Delta Air Lines, Inc., and Northwest Airlines, Inc. The Board has been advised that it will be inconvenient for the Court to immediately dispose of the petition for stay, and that the convenience of the Court would best be served by a postponement of the effective dates of such awards until December 7, 1958.

[fol. 1594] Accordingly, It is Ordered That the effectiveness of the amended certificates of public convenience and necessity issued by our Order E-13024 be and they are hereby stayed to and including December 6, 1958 insofar as such certificates:

a. Grant Northwest Airlines, Inc. a new route segment between Chicago, Atlanta, Tampa-St. Petersburg-Clearwater and Miami;

b. Grant Delta Air Lines, Inc. authority to serve Indianapolis, Louisville, Orlando, Tampa-St. Petersburg-Clearwater and West Palm Beach on Route 54, and extend Route 54 from Cincinnati to Dayton, Columbus, Toledo and Detroit; and

c. Grant Capital Airlines, Inc., an extension of Route 51 from Atlanta to Florida, and from Pittsburgh to Buffalo. By the Civil Aeronautics Board:

/s/ Mabel McCart, Acting Secretary. (Seal.)

BEFORE THE CIVIL AERONAUTICS BOARD

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 5th day of December, 1958

ORDER NO. E-13245 DISSOLVING STAY—December 5, 1958

By our Order E-13190 we stayed the effectiveness of various certificates of public convenience and necessity issued by Order E-13024 to Northwest Airlines, Inc., Delta Air Lines, Inc., and Capital Airlines, Inc., to and including December 6, 1958, so that the United States Court of Appeals for the Second Circuit might have opportunity to rule upon petitions for stay of those certificates. On December 4, 1958 the Court of Appeals denied such petitions.

[fols. 1595-1606] Accordingly, It is Ordered That the stay imposed by our Order E-13190 be and it hereby is dissolved.

By the Civil Aeronautics Board:

/s/ Mabel McCart, Acting Secretary. (Seal.)

[fol. 1607] BEFORE THE CIVIL AERONAUTICS BOARD

ORDER NO. E-14224 DENYING PETITIONS FOR RECONSIDERATION AND FOR STAY

Delta Air Lines, Inc. (Delta), has filed a petition for reconsideration of Order No. E-13835, May 7, 1959, insofar as pursuant to that order the Board issued Delta an amended certificate of public convenience and necessity for route No. 54 imposing certain long-haul restrictions on Delta's services between pairs of points newly authorized

for service on route No. 54 pursuant to our decision in this case.¹

Delta's motion for stay of the effectiveness of the certificate condition insofar as it requires flights serving Chicago and Indianapolis to originate or terminate at Atlanta or a point south thereof was denied by Order No. E-14044, June 16, 1959.

The addition of Indianapolis, Louisville, and Dayton to Delta's route No. 54 without certificate restriction would have permitted the carrier to provide turnaround services between these new points and certain points previously authorized for service on route No. 54, services which we [fol. 1608] concluded should not be authorized now. We, accordingly, added condition (8) to Delta's certificate and deferred action on Delta's application for unrestricted authority in the markets involved for contemporaneous decision with the *Great Lakes Local Service Investigation*, Docket No. 4251 *et al.*, the proceeding in which we will consider carrier applications to provide essentially local service in the Great Lakes area.

In its petition for reconsideration, Delta alleges that although our order indicated that the imposition of condition (8) was limited, that the condition is not limited in time in the amended certificate issued to the carrier. Delta therefore asks the Board to modify its certificate for route No. 54 to note that condition (8) shall be effective only until 60 days after our decision in the *Great Lakes Local Service Case*. Delta also questions our power to add condition (8) pursuant to our opinion on reconsideration in view of the fact that the original amended certificate issued to Delta in this case authorizing unrestricted service between Indian-

¹ The specific certificate condition in question, condition (8), provides as follows:

"(8) Flights scheduled to serve any of the following pairs of points shall originate or terminate at Atlanta, Ga., or a point south thereof:

Indianapolis, Ind.-Chicago, Ill.
Indianapolis, Ind.-Louisville, Ky.
Indianapolis, Ind.-Asheville, N. C.
Dayton, Ohio-Asheville, N. C.
Louisville, Ky.-Lexington, Ky.

Indianapolis, Ind.-Cincinnati, Ohio
Indianapolis, Ind.-Lexington, Ky.
Dayton, Ohio-Lexington, Ky.
Cincinnati, Ohio-Louisville, Ky.
Louisville, Ky.-Asheville, N. C."

apolis, Louisville, and Dayton, on the one hand, and certain other route No. 54 points, on the other hand, had become effective.

Delta has also filed a petition for stay of the effectiveness [fol. 1609] of Order No. E-13835 insofar as it imposes the long-haul condition in question, pending disposition by the Court of Appeals of the carrier's petition for judicial review of the Board's action in adding condition (8). An answer to the petition for stay has been filed by Lake Central. In the petition for stay, Delta again asserts its view that imposition of the condition was illegal and requests expeditious action on the petition, since the Board's denial of its partial stay motion as to Chicago-Indianapolis flights, places the carrier in present violation of its certificate.²

Upon consideration of the foregoing, the Board concludes that Delta's petitions should be denied. Insofar as Delta's petition for reconsideration is concerned, we believe Order No. E-13835 makes clear that we are not now deciding whether condition (8) should be retained after our decision in the *Great Lakes Local Service Case* and that our resolution of that question is deferred for later consideration. The reasons for such deferral are clearly set forth in Order No. E-13835, previously mentioned. The fact that the new condition does not bear a specific expiration date does not affect our specifically stated reservation that final decision on whether the condition will be retained or removed is deferred for later consideration. We therefore see no purpose to be served by indicating in the certificate itself that final decision on certain aspects of Delta's application consolidated with the present case has been deferred and we have not followed that practice in similar instances in the past.

In the light of the foregoing discussion, we see no basis for granting Delta's petition for stay. Insofar as the carrier challenges our power to impose condition (8) because its amended certificate authorizing unrestricted service between the particular pairs of points in question had

² The carrier is still providing service to Chicago and Indianapolis on flights which do not originate or terminate at Atlanta or a point south thereof.

become effective, we believe we have such power, and we have exercised it in the past. Moreover, there is no showing, and we are unable to conclude, that any significant adverse effect will result to either Delta or the public from [fol. 1610] observance of the conditions here involved.

Accordingly, It is Ordered: That Delta's petition for reconsideration of Order No. E-13835 and petition for stay be and they hereby are denied.

By the Civil Aeronautics Board:

/s/ Mabel McCart, Acting Secretary. (Seal.)

[fol. 1611] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1959

No. 248

Argued March 30, 1960

Docket No. 25852

DELTA AIR LINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

LAKE CENTRAL AIRLINES, INC., et al., Intervenor.

Before Waterman and Moore, Circuit Judges, and Smith,
District Judge

Petition to review various orders of the Civil Aeronautics Board imposing restrictions upon petitioner's effective certificate in the course of the Board's disposition of intervenors' timely-filed petitions for reconsideration. Orders set aside.

OPINION—June 29, 1960

R. S. Maurer, James W. Callison (Frank F. Rox, of counsel), Atlanta, Georgia, Legal Division, Delta Air Lines, Inc., for Petitioner.

[fol. 1612] Robert A. Bicks, Acting Asst. Attorney Gen-

eral; Richard A. Solomon, Atty., Department of Justice; Franklin M. Stone, General Counsel, Civil Aeronautics Board; John H. Wanner, Deputy General Counsel; O. D. Ozment, Assoc. General Counsel, Litigation and Research; Morris Chertkov, Attorney, Civil Aeronautics Board, for Respondent.

Albert F. Grisard, Washington, D. C., for Intervenor, Lake Central Airlines, Inc.

WATERMAN, Circuit Judge:

Petitioner is a certificated trunk-line air carrier possessing routes that, in the main, run from the mid-west to the southeast quarter of the country. The present controversy arises out of the Board's area proceeding known as the "Great Lakes-Southeast Service Case." Other aspects of this same area proceeding were recently before this court in *Eastern Air Lines v. CAB*, 271 F. 2d 752 (2 Cir. 1959), *cert denied*, 362 U. S. 970. For a general description of this "area proceeding" and for a statement of the air transportation the Board had under consideration in the "Great Lakes-Southeast Service Case" we refer to our opinion in *Eastern Air Lines v. CAB; supra*.

In its decision and order in the above area proceeding, Order No. E-13024 of September 30, 1958, the Board added six cities to Delta's pre-existing Route 54, which prior to that time served Chicago and Miami with certain intermediate points, but bypassed Indianapolis. The addition to Delta's authority of the three cities of Columbus, Toledo, and Detroit permitted Delta for the first time to offer service between Miami and Detroit, and for that reason this authority extension was important to the issues presented to this court in *Eastern Air Lines v. CAB, supra*, but it has no bearing on the question now before us. The addition of the three cities of Dayton, Louisville, and Indianapolis permitted Delta for the first time to offer service between these cities and the other cities which lay on its Route 54. Since Indianapolis already was an authorized intermediate point on Delta's Route 8 between New Orleans and Detroit, the inclusion of Indianapolis as an intermediate point on Route 54 had the additional effect, which the Board recognized and approved, of permitting Delta on the same flight, provided that the flight stopped at

Indianapolis, to serve cities on both of these routes.¹ By the Board's September 30 order Delta's new certificate, incorporating this additional authority, was to become effective in November 29, with the proviso that prior thereto the Board might extend that effective date upon its own initiative or upon a petition for reconsideration of the Board's September 30 order. The new certificates of other carriers who had received new authorizations under the "Great Lakes-Southeast Service" decision had the same effective date and were subject to the same proviso.

Numerous petitions for reconsideration were indeed filed. Included among these were petitions by Lake Central Airlines, Inc. and Piedmont Aviation, Inc., two local service carriers. The new route applications of all local service carriers had been excluded by the Board from the "Great Lakes-Southeast Service Case," the Board stating that it would consider them later in a separate proceeding. The local service carriers, however, were permitted to intervene to present evidence as to the effect that an award to [fol. 1614] a trunkline carrier might have upon the local service carriers' present or contemplated operations. In their petitions for reconsideration Lake Central and Piedmont sought, *inter alia*, to have restrictions imposed on Delta's service between ten pairs of cities² which, as a result of the addition of Indianapolis, Louisville and Dayton to Route 54, Delta would be able to serve without restriction under the certificate authorized by the Board's September 30 decision. Lake Central's petition contained a

¹ Unless the Board imposes "restrictions" a carrier may operate flights between any combination of authorized points on a given linear route. Similarly, absent restrictions, when two routes of a carrier have a common point, the carrier may operate flights between any combination of points on the two routes via the common point.

² The ten pairs of cities are:

Indianapolis, Ind.-Chicago, Ill.; Indianapolis, Ind.-Cincinnati, Ohio; Indianapolis, Ind.-Louisville, Ky.; Indianapolis, Ind.-Lexington, Ky.; Indianapolis, Ind.-Asheville, N.C.; Dayton, Ohio-Lexington, Ky.; Dayton, Ohio-Asheville, N. C.; Cincinnati, Ohio-Louisville, Ky.; Louisville, Ky.-Lexington, Ky.; Louisville, Ky.-Asheville, N. C.

request to stay the effective date of Delta's certificate. By order No. E-13190, dated November 21, the Board stayed the effectiveness of Delta's certificate for the period to and including December 6, for the convenience of this court in considering Eastern's request for a judicial stay. Two other certificates were also stayed for this reason. On November 28, 1958 the Board issued Order No. E-13211, which, with one exception,³ refused to stay the effective date of any new certificate beyond December 7. The Board assigned two interrelated reasons for its refusal to grant further stays. First, the Board found that the various reconsideration petitions did not make sufficient showings of probable legal error or abuse of discretion. Second, the [fol. 1615] Board wished to have the new services inaugurated in time for the peak period of winter travel. The Board's opinion in Order No. E-13211 closed with the statement that the order was not a disposition of the several petitions for reconsideration on their merits.⁴

On December 4 this court denied Eastern's request for a judicial stay, and, in recognition thereof, on December 5 the Board by Order No. E-13245 dissolved the stay imposed by Order No. E-13190. Accordingly on December 5, 1958, Delta's certificate became effective. On January 1, 1959, pursuant to schedules filed with the Board, Delta inaugurated service between Chicago and Indianapolis, with flights continuing beyond Indianapolis southward to Evansville, Indiana, a city Delta was authorized to service on its previously established Route 8.

³The exception was the certificate of Eastern Air Lines. Piedmont, in its petition for reconsideration, in addition to seeking to have restrictions imposed on Delta's service between the pairs of cities set forth in footnote 2, *supra*, sought to prevent the extension of Eastern's Route 6 from Charleston, W. Va. to Chicago. In its opinion accompanying Order No. E-13211, the Board held that Piedmont's objections to Eastern's additional authorization raised serious questions; and accordingly it stayed the effective date of Eastern's new certificate until further action by the Board.

⁴The opinion stated: "Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits."

On May 7, 1959 the Board issued the order here complained of, Order No. E.13835.⁵ This order constituted the Board's formal disposition of the various petitions for its reconsideration of the September 30 decision. This order modified the former decision. One modification was that restrictions were imposed on Delta's service between the ten pairs of cities set forth in footnote 2, *supra*, so that a Delta flight serving any of the pairs of cities was required to originate at Atlanta or at a point on Route 54 south thereof.⁶ One effect of the restrictions was to forbid the service Delta had inaugurated between Evansville and Chicago [fol. 1616] via Indianapolis unless that flight began at Atlanta and proceeded on a circuitous routing through Memphis.

The issue here is whether, on the above facts, the Board had power to alter Delta's certificate without resort to a modification proceeding under Section 401(g) of the Act, 49 U. S. C. 1371(g).⁷ It is the Board's contention that it may modify a certificate subsequent to the effective date of the certificate in the course of passing upon timely filed petitions for reconsideration of the award contained therein; and that the proceedings provided for in Section 401(g) only need to be followed after the Board has finally disposed of these petitions for reconsideration. We disagree.

Section 401(f), relating to the effective date and dura-

⁵ Delta's petition also encompasses Order No. E-14044 denying Delta's motion for a partial stay in order to permit the continuance of the Evansville-Indianapolis-Chicago service, and Order No. 1-14224 denying Delta's petition for a stay pending judicial review.

⁶ The Board indicated that the advisability of these restrictions would be considered anew in the later local service carrier area proceeding.

⁷ Between the time of the Board's initial action and the modification on reconsideration, the Civil Aeronautics Act (52 Stat. 973, 49 U. S. C. 401), was supplanted by the Federal Aviation Act (72 Stat. 731, 49 U.S.C. 1301). The provisions of the former Act here involved were re-enacted without change, and there is admittedly no issue here stemming from the supplantation of the Civil Aeronautics Act.

tion of an air carrier's certificate of public convenience and necessity provides as follows: "Each certificate shall be effective from the date specified therein, and *shall continue in effect until suspended or revoked as hereinafter provided* * * * " (Italics supplied.) The phrase "as hereinafter provided" would appear to require our rejection of the Board's argument that it has some form of implied power to alter the authority conferred in an effective certificate. Section 401(g) is the only section of the Act expressly dealing with the modification of certificates. The Board maintains that power to modify an effective certificate can be found in Section 204(a), 49 U. S. C. 1324(a), but this argument is almost identical to the position taken by the Interstate Commerce Commission in *United States v. Seatrain Lines*, 329 U. S. 424 (1947), and there rejected by the Supreme Court, *supra*, at pp. 432-33. This holding of the Supreme Court in *Seatrain* is likewise fully dispositive of any Board reliance upon Section 1005(d), 49 U.S.C. 1485(d) as express statutory support for its position.

Save for the exceptions in Section 401(f) set forth in footnote 8, *supra*, Sections 401(f) and 401(g) are patterned very closely upon Section 212(a) of Part II of the Interstate Commerce Act, 49 U. S. C. §312(a). In *Smith Bros., Revocation of Certificate*, 33 MCC 465, 472 (1942), the Interstate Commerce Commission in construing Section 212(a) announced the following principle: "We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited." The Board makes a futile effort to

* Section 401(f) states three exceptions, none here applicable, to the above rule. A certificate conferring temporary authority ceases to be effective upon the expiration of its term; a certificate will cease to be effective if the Board certifies that operations under the certificate have ceased; and if the carrier fails to inaugurate service authorized by a certificate within ninety days of the date of authorization, the Board upon notice and hearing may revoke the unused authority.

distinguish the *Smith Bros.* case on the ground that a revocation of a certificate is more closely circumscribed by statute than a certificate's modification. Under both Sections 212(a) of Part II of the Interstate Commerce Act and Section 401(g) of the Federal Aviation Act modification differs from revocation only as to the matters the Commission or Board must demonstrate *once a proper proceeding has been instituted*. The statutory requirement to institute a proceeding is the same whether the certificate is to be modified or revoked. The *Smith Bros.* case has been frequently cited with apparent approval in the Supreme Court and other federal courts. We follow it, believing its principle to be as applicable [fol. 1618] to the Federal Aviation Act as to Part II of the Interstate Commerce Act.

It is true that in cases involving motor carriers under Part II of the Interstate Commerce Act the Supreme Court has held that, under certain closely-defined circumstances, an effective certificate may be modified by the Commission without resort to a formal proceeding under Section 212(a). For instance, in *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U. S. 133, 146 (1958) the Supreme Court held that the Commission may so rectify "inadvertent ministerial errors." In the present case there is no suggestion that Delta's certificate inadvertently contained greater authority than the Board intended to confer by its September 30 order. Moreover, it is affirmatively clear that when the Board refused on November 28, 1958 to stay the effective date of Delta's certificate it was fully aware of the arguments which subsequently led it on May 7, 1959 to impose the restrictions here complained of.⁹ Indeed, for this reason, the present case is similar to *Watson Bros. Transp. Co. v. United States*, 132 F. Supp. 905 (D. Neb. 1955), *aff'd*, 350 U. S. 927 (1956), where the three-judge district court concluded on the facts present there that the modification of a motor carrier's certificate had resulted from a change in administrative policy, and therefore held that the change was beyond the Interstate Commerce Commission's power. In any event, the present case is clearly distinguishable from the

⁹ See footnote 3, *supra*.

case of *United States v. Rock Island Motor Transit Co.*, 340 U. S. 419 (71 S. Ct. 382) (1951), *rehearing denied*, 341 U. S. 906, where the Supreme Court held that the Commission had power, apart from a proceeding under Section 212(a), to impose specific restrictions to implement an already existing but somewhat generally-phrased restriction on the type of service the carrier was certificated [fol. 1619] to perform. We are of the opinion that the imposition of a restriction on service under a certificate that previously had authorized the service without any restriction presents an entirely different matter than that before the Court in *Rock Island Motor Transit*.

The Board, seeking to justify its act here on the basis of past performance, informs us that, in the past, upon a petition for rehearing, it has modified a certificate it had allowed to become effective.¹⁰ However, on at least one other occasion it expressed grave doubt as to its statutory power to do so. *Kansas City-Memphis-Florida Case*, 9 CAB 401, 408-09 (1948). Moreover, the Board has represented to at least one court that it has been its practice to stay the effective date of a certificate in order to permit it time to consider the merits of reconsideration petitions. *Southwest Airways v. CAB*, 196 F. 2d 937, 938 (9 Cir. 1952).¹¹ We do not find that the Board in this

¹⁰ *Cincinnati-New York Additional Service*, 8 CAB 603, 604 (1947) seems to be the clearest example.

¹¹ *Western Air Lines v. CAB*, 194 F. 2d 211 (9 Cir. 1952) involved a Board procedure entirely different from that in the present case. In *Western Air Lines* the Board, subsequent to the effective date of its order approving the transfer of a certificate, imposed labor protective conditions upon the transfer. The Board's power relative to the transfer of certificates is governed by Section 401(h), 49 U. S. C. §1371(h) rather than Sections 401(f) and 401(g). Under Part II of the Interstate Commerce Act, the Supreme Court has stated that the Commission's power to amend an order approving the transfer of a certificate is more flexible than its power to amend a certificate. *United States v. Rock Island Motor Transit Co.*, 340 U. S. 419, 445-46 (1951), *rehearing denied*, 341 U. S. 906. In addition, *Western Air Lines* involved misrepresentation in

particular can rely upon a consistent administrative interpretation of its statutory powers similar to the consistent [fol. 1620] interpretation found in *United States v. Leslie Salt Co.*, 350 U. S. 383, 396 (1956).

Finally, the Board argues that unless we uphold its position that resort to 401(g) of the Act is unnecessary it will be confronted with a dilemma in the management of its large-scale area proceedings. In its brief the Board states: "Moreover, Delta's concept, if adopted, would be prejudicial both to the traveling public and the carriers, for in some cases it could only result either in a hasty and largely meaningless passing on reconsideration requests of a highly technical economic nature, or the further postponement of the effective dates of certificates with the attendant deprivation of needed public service and additional carrier revenues, on the small chance that a further review will result in a change of the original decision." We admit the Board's dilemma is real¹² but we find that this dilemma is inherent in the statutory scheme of Sections 401(f) and 401(g). It is our view that once a certificate has become effective, the Act requires that the Board resort to more formal—even though possibly more time-consuming—procedures to modify such a certificate, irrespective of whether the modification is entirely in the public interest.

Our holding is not based upon the fact that, prior to the date on which the certificate was modified, Delta inaugurated service authorized by the certificate. Furthermore, we have accepted, *arguendo*, the Board's argument that the language in the order quoted in footnote 4, *supra*, put Delta on notice that the Board purported to reserve to itself power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration.

testimony before the Board. There is language in *Smith Bros., Revocation of Certificate*, 33 MCC 465 (1942) indicating that if a certificate has been obtained as a result of misrepresentation it may be revoked without a formal proceeding under Section 212(a), 49 U. S. C. §312(a).

¹² We suggest, however, that the Board investigate the possibility of issuing some form of temporary authorization.

We hold that under Sections 401(f) and 401(g) of the Federal Aviation Act, absent fraud, misrepresentation or [fol. 1621] clerical error in the original issuance of the certificate, it is only in a proceeding satisfying the requirements of Section 401(g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions.

Orders No. E-13835, E-14044, and E-14224 are set aside to the extent that they impose restrictions on the certificate of Delta Air Lines, Inc., which became effective on December 5, 1958.

[fol. 1622] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1959

No. 248

DELTA AIR LINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

LAKE CENTRAL AIRLINES, INC., et al., Intervenor

JUDGMENT AND DECREE—July 21, 1960

This cause having come on for hearing on the transcript of the record from the Civil Aeronautics Board, and the Court, upon consideration of the record, briefs and arguments of Counsel, having filed its opinion herein on June 29, 1960, it is

Ordered, Adjudged and Decreed that the orders of the Civil Aeronautics Board of which review is sought in this case be, and they hereby are, set aside to the extent that they impose restrictions on the certificate of Delta Air Lines, Inc., which became effective on December 5, 1958.

Steven R. Waterman, Leonard P. Moore, J. Joseph Smith, U.S. District Judge.

Dated: July 21, 1960.

[fol. 1623] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1624] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1960

No. 492

CIVIL AERONAUTICS BOARD, Petitioner,

vs.

DELTA AIR LINES, INC.

ORDER ALLOWING CERTIORARI—December 12, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1625] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC., Petitioner,

vs.

DELTA AIR LINES, INC.

ORDER ALLOWING CERTIORARI—December 12, 1960

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OCT 19 1960

JAMES R. BROWNING, Clerk

No. **492**

In the Supreme Court of the United States

OCTOBER TERM, 1960

CIVIL AERONAUTICS BOARD, PETITIONER

DELTA AIR LINES, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

CIVIL AERONAUTICS BOARD, PETITIONER

v.

DELTA AIR LINES, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

The Solicitor General, on behalf of the Civil Aeronautics Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on July 21, 1960.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 15-24) is reported at 280 F. 2d 43.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1960 (Appendix B, *infra*, p. 25). The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, once it has entered an order permitting a certificate of public convenience and necessity to become effective, is without power thereafter, in the same proceeding, to modify the certificate in response to a timely petition for reconsideration filed prior to the effective date, where the Board's order expressly reserved the right to make such modification.

STATUTE INVOLVED

Sections 401 (f) and (g) of the Federal Aviation Act (72 Stat. 755-56, 49 U.S.C. 1371 (f) and (g)) provide:

EFFECTIVE DATE AND DURATION OF CERTIFICATE

(f) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as herein-after provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated,

the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

STATEMENT

The present controversy arises out of the so-called Great Lakes-Southeast Service case, a proceeding in which the Civil Aeronautics Board considered the long-haul service needs for an area extending roughly between the Great Lakes and Florida and a large number of applications by the trunkline carriers to serve

these needs. In order to keep the administrative proceedings within manageable bounds, the Board declined to consolidate a number of applications which had been filed by local-service carriers to provide new and improved short-haul service between certain intermediate cities in the area. Instead, it directed the institution of a separate proceeding (Great Lakes Local Service Investigation, Docket No. 4251) on those applications. However, in order to insure that this separation of the two proceedings would not deprive the local-service carriers of their rights under *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, and to give these carriers an opportunity to show the effect of a grant upon their existing operations, the Board permitted the local carriers to intervene in the long-haul proceeding.

The Board's decision in the long-haul proceeding made a number of awards, including grants permitting the respondent, Delta Air Lines (Delta), to extend an existing route northwest so as to provide service from Detroit to Miami and to add Indianapolis and Louisville as points on Delta's existing Chicago to Miami route. Although the Board imposed restrictions on a number of the new awards to protect local service carriers¹ it imposed no such restrictions with respect to some ten pairs of intermediate points on the long-haul routes Delta was authorized to serve.

¹ These restrictions normally preclude so-called "turnaround" service between two points by requiring that service between these points be only on a flight originated or terminated in some distant city.

The Board's decision and order in the Great Lakes-Southeast Service (long-haul) case was issued on September 30, 1958 (J.A. 1373a)² and provided that the certificates issued pursuant thereto were to become effective on November 29, 1958, unless extended by the Board prior to that date (J.A. 1384a). Within the 30 days then prescribed by the Board rules (see § 302.37 of the Board Rules of Practice, 14 C.F.R. 302.37, 1956 Rev. ed.), Lake Central Air Lines and Piedmont Aviation, local carriers which had been permitted to intervene in the proceeding to protect their interests (J.A. 78a, 82a, 83a), filed timely petitions for reconsideration. These petitions sought to impose on Delta's service to the ten pairs of cities referred to above a requirement that service to them originate or terminate at some distant city (Add'l. J.A. 1587a-1592a). Lake Central also asked that the effective date of Delta's certificate be stayed pending a Board decision on the petitions for reconsideration (*Id.* at 1591a-1592a).

On November 28, 1958, one day prior to the proposed effective date of the certificates, the Board issued a lengthy memorandum and order (E-13211) in response to the numerous requests for stay which had been filed in connection with the 16 petitions for reconsideration of its September 30 decision. With one exception not here relevant, these stays were de-

² "J.A." refers to the three-volume Joint Appendix filed in Case Nos. 25,422, etc., in the court below and, by stipulation, made part of the record in this case. "Add'l. J.A." refers to the blue-covered Additional Joint Appendix filed in the court below in the instant case, No. 25,852.

nied, the Board concluding that "the parties have not made a sufficient showing of probable legal error or abuse of discretion in our decision" and that in view of the advent of the peak winter season the "new services to Florida are immediately required", a consideration the Board felt "clearly weights the scale * * * in favor of a denial of the requested stay" (J.A. 1471a). But the Board made clear that "because of the detailed matters raised in the petitions for reconsideration, it will not be possible to finally dispose of them until after November 29" (J.A. 1470a), and that denial of the stays "is in no way prejudicial to the legal rights of those parties seeking reconsideration. Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits" (J.A. 1496a).³

On May 7, 1959, the Board issued an order (E-13835) disposing of the petitions on their merits (J.A. 1509a, 1517a). This order, which gives rise to the present controversy, granted Lake Central's and Piedmont's petitions and imposed restrictions on Delta's certificate to preclude operations between the ten pairs of cities unless the flights originated or terminated at Atlanta or a point south thereof (J.A. 1511a, 1512a, 1517a). In imposing these restrictions the Board noted that "[i]f, after deciding the issues presented in the *Great Lakes Local Service Case*, we con-

³ The awards actually became effective on December 5, 1958, because of a temporary stay granted by the Board to enable the court of appeals to consider a stay request addressed to it (Add'l. J.A. 1593a-1595a).

clude that the long-haul restrictions are not required, we will have full freedom to remove them at that time" (J.A. 1512a).

The court of appeals reversed, holding that the Board, once it permits a certificate to become effective, is thereafter without power in the same proceeding to add restrictions to the certificate, even in response to a timely petition for reconsideration filed prior to the effective date of the certificate (App. A, *infra*, pp. 15-24). The court assumed that Delta was "on notice" that the Board might "modify the certificate on the basis of matters set forth in the filed petitions for reconsideration" (*id.* at 24), stating that its "holding is not based upon the fact that, prior to the date the certificate was modified, Delta inaugurated service authorized by the certificate" (*ibid.*).⁴ Its view was that Sections 401(f) and (g) of the Federal Aviation Act require the conclusion that, in the absence of fraud, misrepresentation or clerical error, a certificate which the Board had permitted to become effective can thereafter be modified only in a new proceeding satisfying the requirements of § 401(g) (*ibid.*).

REASONS FOR GRANTING THE WRIT

The court below, we submit, has misconstrued the Federal Aviation Act and has misapplied court and agency decisions dealing with entirely discrete problems. In consequence, it has seriously limited the authority of the Civil Aeronautics Board to recon-

⁴On January 1, 1959, Delta had inaugurated a local flight including service between Chicago and Indianapolis, one of the ten pairs of cities to which the Lake Central and Piedmont petition for reconsideration had been directed.

sider on timely petition decisions awarding certificates of public convenience and necessity. The holding that the Board must either defer allowing the certificates to become effective or that it must finally resolve, prior to the effective date, all of the complicated issues which may be presented by the multiple petitions for reconsideration frequently filed in complex route cases is one that cannot fail to impair the administrative process. That holding, moreover, is inconsistent with the view expressed by this and other courts.

1. The court of appeals believed that its decision was compelled by the language of Section 401(f) of the Act, providing that "[e]ach certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided". This it construed as meaning that an effective certificate could not be changed in any way except after further notice and hearing in accordance with the provisions of Section 401(g), which sets out the procedure under which the Board may "alter, amend, modify, or suspend" a certificate or may revoke it. But nothing in either section purports to bar the Board from exercising its power to reconsider its decisions prior to the time a certificate has been finally granted and the

time for rehearing it has passed,* and the cases the court below cites to support its decision are clearly inapposite.*

We believe that the procedures of Section 401(g) do not come into play until, as this Court has indicated with respect to the comparable provisions of the Motor Carrier Act, 49 U.S.C. 312, "the certificate [has been] finally granted *and the time fixed for rehearing it has passed*". *United States v. Seatrail Lines*, 329 U.S. 424, 432 (emphasis added). A similar view has been expressed by the Court of Appeals for the District of Columbia Circuit with specific reference to the authority of the Civil Aeronautics Board, *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C.). There, the court rejected an argument that the Board's order on reconsideration, which included an amendment of an effective award, was "a nullity because it was rendered * * * after the certificates previously issued had become effective" (*id.* at 810). See, also, *Western Airlines, Inc. v. Civil Aero-*

* There is, of course, no question of the Board's power to reconsider pursuant to its Rules of Practice (§ 302.37). "The power to reconsider is inherent in the power to decide." *Albertson v. Federal Communications Commission*, 182 F. 2d 397, 399 (C.A.D.C.). It also derives from Sections 204(a), 1001 and 1005(d) of the Federal Aviation Act (49 U.S.C. 1324(a), 1481 and 1485(d)). See *American Trucking Assns. v. Frisco Co.*, 358 U.S. 133, 145.

* Even under the court's view of the law it would appear that respondent received, in substance, all of the protection afforded by Section 401(g). For "notice" of the proposed modification was provided by the petition for reconsideration, as well as the Board's express reservation, in its order denying a stay, of its "power to modify the certificate on the basis of the matters set forth in the filed petitions for reconsideration" (App. A, *infra*, p. 24). And any "hearings" relevant to the issue had already

navitics Board, 194 F. 2d 211, 214 (C.A. 9).⁷ The essential function of Section 401(g), it seems clear, is to set forth the procedures for making changes in operative certificates necessitated by conditions arising *after* the completion of the initial licensing proceeding.

The cases relied on by the court of appeals—*United States v. Seatrain Lines*, *supra*; *United States v. Watson Bros. Transportation Co.*, 350 U.S. 927, affirming 132 F. Supp. 905 (D. Neb.); *American Trucking Assns. v. Frisco Co.*, 358 U.S. 133, and *Smith Bros., Revocation of Certificate*, 33 M.C.C. 465—are entirely consistent with our view of the statutory scheme. All of these cases relate to the question whether an administrative agency may reopen a closed proceeding, long after disposition of any petition for reconsideration that may have been filed, to modify or revoke an outstanding certificate. Indeed, these cases lend support to the position which we urge here, for they emphasize that even in such circumstances there are occasions when a new proceeding is not required. See, *e.g.*, *American Trucking Assns. v. Frisco*, *supra*, 358 U.S. at 145-146. In any event, the Board's order here expressly left open the question of modification raised by the petition for reconsideration—the licensing pro-

been had since reconsideration was sought on the basis of the record already made (see Add'l. J.A. 1587a-1592a).

⁷ The Board has previously modified, upon reconsideration, certificates which it had allowed to become effective. See, *e.g.*, *North Central Case*, 8 C.A.B. 208 (1947); *Cincinnati-New York Additional Service*, 8 C.A.B. 603 (1947); *United-Western, Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950); *Service to Phoenix Case*, Order E-12039 (1957); *South Central Area Local Service Case*, Order E-14219 (1959).

ceeding was administratively still open, therefore, not closed.

2. The decision below has important bearing on the Board's administration of its statutory responsibilities. It disables the Board from authorizing needed services while petitions for reconsideration are pending. It affects not only the Board's power to add restrictions; it applies equally to alterations sought by the grantee, such as the addition of new points or the removal of restrictions previously imposed.* The consequence may be either unduly hasty decision on requests for reconsideration raising complex problems or the postponement of the effective dates of certificates with an attendant loss of needed public services and carrier revenues.*

* A further consequence of the decision below is to create uncertainty with respect to the time for filing an appeal from the Board's order. The majority rule of the courts of appeals is that the timely filing of a petition for reconsideration tolls the time for seeking judicial review, which then runs from the date of Board action on the petition. See *e.g.*, *Bräniff Airways v. Civil Aeronautics Board*, 147 F. 2d 152, 153 (C.A.D.C.); *Frontier Airlines v. Civil Aeronautics Board*, *supra*; *Waterman Steamship Corp. v. Civil Aeronautics Board*, 159 F. 2d 828, 829, (C.A. 5), reversed on other grounds, 333 U.S. 103. But cf. *Consolidated Flowers Shipments v. Civil Aeronautics Board*, 205 F. 2d 449 (C.A. 9). If, however, permitting the certificate to become effective ousted the Board from jurisdiction, it would appear that as a precautionary measure appeals would have to be filed unless the Commission had acted on the petition within the 60-day period from the original Board order (see 49 U.S.C. 1486(a)), or had previously indicated its intent to stay the effective date.

* Had the Board postponed the effective dates of certificates until May 7, 1959, when the reconsideration requests were decided, the peak Florida winter season travel would have been lost to the three newly certificated carriers, including Delta.

The opinion below suggests (App. A, *infra*, p. 24) that the Board might, for the future, "investigate the possibility of issuing some form of temporary authorization."¹⁰ Since we believe that the Board, like other administrative agencies performing licensing functions, already has the power to deal with the practical problems involved by ordinary rehearing procedures, we urge that it should not be remitted to the necessity of investigating the possibility of pursuing other and less direct means of achieving a similar result. Moreover, if the court below is right in its holding that the traditional method of proceeding is not available to the Board, it may fairly be presumed that the adoption of other and oblique methods of accomplishing the same results would be open to serious challenge and would be productive of extensive new litigation.

¹⁰ It can well be argued that a "temporary authorization" was in substance all that respondent received (at the time its certificate became effective) since it was subject to such changes as a "full and complete consideration of the pending petitions for reconsideration" might warrant (J.A. 1496a). Cf. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 444-448.

CONCLUSION

The decision below raises an important question of administrative procedure which bears directly upon the ability of the Civil Aeronautics Board to perform its licensing functions effectively and expeditiously. We believe that the decision is in error and that it conflicts with views expressed by this Court and by other courts of appeals. The petition for certiorari should be granted.

Respectfully submitted.

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OCTOBER 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 248—October Term, 1959

Docket No. 25852

DELTA AIR LINES, INC., PETITIONER, *v.* CIVIL AERONAUTICS BOARD, RESPONDENT; LAKE CENTRAL AIRLINES, INC., ET AL., INTERVENORS

Before: WATERMAN and MOORE, *Circuit Judges*, and SMITH, *District Judge*.

WATERMAN, *Circuit Judge*:

Petitioner is a certificated trunk-line air carrier possessing routes that, in the main, run from the mid-west to the southeast quarter of the country. The present controversy arises out of the Board's area proceeding known as the "Great Lakes-Southeast Service Case." Other aspects of this same area proceeding were recently before this court in *Eastern Air Lines v. CAB*, 271 F. 2d 752 (2 Cir. 1959), *cert. denied*, 362 U.S. 970. For a general description of this "area proceeding" and for a statement of the air transportation the Board had under consideration in the "Great Lakes-Southeast Service Case" we refer to our opinion in *Eastern Air Lines v. CAB*, *supra*.

In its decision and order in the above area proceeding, Order No. E-13024 of September 30, 1958, the Board added six cities to Delta's pre-existing Route 54, which prior to that time served Chicago and Miami with certain intermediate points, but bypassed Indi-

anapolis. The addition to Delta's authority of the three cities of Columbus, Toledo, and Detroit permitted Delta for the first time to offer service between Miami and Detroit, and for that reason this authority extension was important to the issues presented to this court in *Eastern Air Lines v. CAB, supra*, but it has no bearing on the question now before us. The addition of the three cities of Dayton, Louisville, and Indianapolis permitted Delta for the first time to offer service between these cities and the other cities which lay on its Route 54. Since Indianapolis already was an authorized intermediate point on Delta's Route 8 between New Orleans and Detroit, the inclusion of Indianapolis as an intermediate point on Route 54 had the additional effect, which the Board recognized and approved, of permitting Delta on the same flight, provided that the flight stopped at Indianapolis, to serve cities on both of these routes.¹ By the Board's September 30 order Delta's new certificate, incorporating this additional authority, was to become effective on November 29, with the proviso that prior thereto the Board might extend that effective date upon its own initiative or upon a petition for reconsideration of the Board's September 30 order. The new certificates of other carriers who had received new authorizations under the "Great Lakes-Southeast Service" decision had the same effective date and were subject to the same proviso.

Numerous petitions for reconsideration were indeed filed. Included among these were petitions by Lake

¹ Unless the Board imposes "restrictions" a carrier may operate flights between any combination of authorized points on a given linear route. Similarly, absent restrictions, when two routes of a carrier have a common point, the carrier may operate flights between any combination of points on the two routes via the common point.

Central Airlines, Inc., and Piedmont Aviation, Inc., two local service carriers. The new route applications of all local service carriers had been excluded by the Board from the "Great Lakes-Southeast Service Case," the Board stating that it would consider them later in a separate proceeding. The local service carriers, however, were permitted to intervene to present evidence as to the effect that an award to a trunkline carrier might have upon the local service carriers' present or contemplated operations. In their petitions for reconsideration Lake Central and Piedmont sought, *inter alia*, to have restrictions imposed on Delta's service between ten pairs of cities² which, as a result of the addition of Indianapolis, Louisville and Dayton to Route 54, Delta would be able to serve without restriction under the certificate authorized by the Board's September 30 decision. Lake Central's petition contained a request to stay the effective date of Delta's certificate. By order No. E-13190, dated November 21, the Board stayed the effectiveness of Delta's certificate for the period to and including December 6 for the convenience of this court in considering Eastern's request for a judicial stay. Two other certificates were also stayed for this reason. On November 28, 1958, the Board issued Order No. E-13211, which, with one exception,³ refused to stay the effective date of any

² The ten pairs of cities are: Indianapolis, Ind.-Chicago, Ill.; Indianapolis, Ind.-Cincinnati, Ohio; Indianapolis, Ind.-Louisville, Ky.; Indianapolis, Ind.-Lexington, Ky.; Indianapolis, Ind.-Asheville, N.C.; Dayton, Ohio-Lexington, Ky.; Dayton, Ohio-Asheville, N.C.; Cincinnati, Ohio-Louisville, Ky.; Louisville, Ky.-Lexington, Ky.; Louisville, Ky.-Asheville, N.C.

³ The exception was the certificate of Eastern Air Lines. Piedmont, in its petition for reconsideration, in addition to seeking to have restrictions imposed on Delta's service between the pairs of cities set forth in footnote 2, *supra*, sought to prevent the extension of Eastern's Route 6 from Charleston, W. Va.

new certificate beyond December 7. The Board assigned two interrelated reasons for its refusal to grant further stays. First, the Board found that the various reconsideration petitions did not make sufficient showings of probable legal error or abuse of discretion. Second, the Board wished to have the new services inaugurated in time for the peak period of winter travel. The Board's opinion in Order No. E-13211 closed with the statement that the order was not a disposition of the several petitions for reconsideration on their merits.*

On December 4 this court denied Eastern's request for a judicial stay, and, in recognition thereof, on December 5 the Board by Order No. E-13245 dissolved the stay imposed by Order No. E-13190. Accordingly, on December 5, 1958, Delta's certificate became effective. On January 1, 1959, pursuant to schedules filed with the Board, Delta inaugurated service between Chicago and Indianapolis, with flights continuing beyond Indianapolis southward to Evansville, Indiana, a city Delta was authorized to service on its previously established Route 8.

On May 7, 1959, the Board issued the order here complained of, Order No. E-13835.* This order con-

to Chicago. In its opinion accompanying Order No. E-13211, the Board held that Piedmont's objections to Eastern's additional authorization raised serious questions; and accordingly it stayed the effective date of Eastern's new certificate until further action by the Board.

*The opinion stated: "Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits."

*Delta's petition also encompasses Order No. E-14044 denying Delta's motion for a partial stay in order to permit the continuance of the Evansville-Indianapolis-Chicago service, and Order No. E-14224 denying Delta's petition for a stay pending judicial review.

stituted the Board's formal disposition of the various petitions for its reconsideration of the September 30 decision. This order modified the former decision. One modification was that restrictions were imposed on Delta's service between the ten pairs of cities set forth in footnote 2, *supra*, so that a Delta flight serving any of the pairs of cities was required to originate at Atlanta or at a point on Route 54 south thereof.* One effect of the restrictions was to forbid the service Delta had inaugurated between Evansville and Chicago via Indianapolis unless that flight began at Atlanta and proceeded on a circuitous routing through Memphis.

The issue here is whether, on the above facts, the Board had power to alter Delta's certificate without resort to a modification proceeding under Section 401 (g) of the Act, 49 U.S.C. 1371(g).⁷ It is the Board's contention that it may modify a certificate subsequent to the effective date of the certificate in the course of passing upon timely filed petitions for reconsideration of the award contained therein; and that the proceedings provided for in Section 401(g) only need to be followed after the Board has finally disposed of these petitions for reconsideration. We disagree.

Section 401(f), relating to the effective date and duration of an air carrier's certificate of public convenience and necessity provides as follows: "Each

* The Board indicated that the advisability of these restrictions would be considered anew in the later local service carrier area proceeding.

⁷ Between the time of the Board's initial action and the modification on reconsideration, the Civil Aeronautics Act (52 Stat. 973; 49 U.S.C. 401) was supplanted by the Federal Aviation Act (72 Stat. 731; 49 U.S.C. 1301). The provisions of the former Act here involved were re-enacted without change, and there is admittedly no issue here stemming from the supplantation of the Civil Aeronautics Act.

certificate shall be effective from the date specified therein, and *shall continue in effect until suspended or revoked as hereinafter provided * * ** (Italics supplied.) The phrase "as hereinafter provided" would appear to require our rejection of the Board's argument that it has some form of implied power to alter the authority conferred in an effective certificate. Section 401(g) is the only section of the Act expressly dealing with the modification of certificates. The Board maintains that power to modify an effective certificate can be found in Section 204(a), 49 U.S.C. 1324(a), but this argument is almost identical to the position taken by the Interstate Commerce Commission in *United States v. Seatrain Lines*, 329 U.S. 424 (1947), and there rejected by the Supreme Court, *supra*, at pp. 432-33. This holding of the Supreme Court in *Seatrain* is likewise fully dispositive of any Board reliance upon Section 1005(d), 49 U.S.C. 1485(d) as express statutory support for its position.

Save for the exceptions in Section 401(f) set forth in footnote 8, *supra*, Sections 401(f) and 401(g) are patterned very closely upon Section 212(a) of Part II of the Interstate Commerce Act, 49 U.S.C. § 312(a). In *Smith Bros., Revocation of Certificate*, 33 MCC 465, 472 (1942), the Interstate Commerce Commission in construing Section 212(a) announced the following principle: "We may issue decision upon decision, and order upon order, on an application for a certificate so

* Section 401(f) states three exceptions, none here applicable, to the above rule. A certificate conferring temporary authority ceases to be effective upon the expiration of its term; a certificate will cease to be effective if the Board certifies that operations under the certificate have ceased; and if the carrier fails to inaugurate service authorized by a certificate within ninety days of the date of authorization, the Board upon notice and hearing may revoke the unused authority.

long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited." The Board makes a futile effort to distinguish the *Smith Bros.* case on the ground that a revocation of a certificate is more closely circumscribed by statute than a certificate's modification. Under both Sections 212(a) of Part II of the Interstate Commerce Act and Section 401(g) of the Federal Aviation Act modification differs from revocation only as to the matters the Commission or Board must demonstrate *once a proper proceeding has been instituted*. The statutory requirement to institute a proceeding is the same whether the certificate is to be modified or revoked. The *Smith Bros.* case has been frequently cited with apparent approval in the Supreme Court and other federal courts. We follow it, believing its principle to be as applicable to the Federal Aviation Act as to Part II of the Interstate Commerce Act.

It is true that in cases involving motor carriers under Part II of the Interstate Commerce Act the Supreme Court has held that, under certain closely-defined circumstances, an effective certificate may be modified by the Commission without resort to a formal proceeding under Section 212(a). For instance, in *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958) the Supreme Court held that the Commission may so rectify "inadvertent ministerial errors." In the present case there is no suggestion that Delta's certificate inadvertently contained greater authority than the Board intended to confer by its September 30 order. Moreover, it is affirmatively clear that when the Board refused on November 28, 1958 to stay the effective date of Delta's certificate it was fully aware of the arguments which

subsequently led it on May 7, 1959 to impose the restrictions here complained of.* Indeed, for this reason, the present case is similar to *Watson Bros. Transp. Co. v. United States*, 132 F. Supp. 905 (D. Neb. 1955), *aff'd*, 350 U.S. 927 (1956), where the three-judge district court concluded on the facts present there that the modification of a motor carrier's certificate had resulted from a change in administrative policy, and therefore held that the change was beyond the Interstate Commerce Commission's power. In any event, the present case is clearly distinguishable from the case of *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419 (71 S. Ct. 382) (1951), *rehearing denied*, 341 U.S. 906, where the Supreme Court held that the Commission had power, apart from a proceeding under Section 212(a), to impose specific restrictions to implement an already existing but somewhat generally-phrased restriction on the type of service the carrier was certificated to perform. We are of the opinion that the imposition of a restriction on service under a certificate that previously had authorized the service without any restriction presents an entirely different matter than that before the Court in *Rock Island Motor Transit*.

The Board, seeking to justify its act here on the basis of past performance, informs us that, in the past, upon a petition for rehearing, it has modified a certificate it had allowed to become effective.¹⁰ However, on at least one other occasion it expressed grave doubt as to its statutory power to do so. *Kansas City-Memphis-Florida Case*, 9 CAB 401, 408-09 (1948). Moreover, the Board has represented to at

* See footnote 3, *supra*.

¹⁰ *Cincinnati-New York Additional Service*, 8 CAB 603, 604 (1947) seems to be the clearest example.

least one court that it has been its practice to stay the effective date of a certificate in order to permit it time to consider the merits of reconsideration petitions. *Southwest Airways v. CAB*, 196 F. 2d 937, 938 (9 Cir. 1952).¹¹ We do not find that the Board in this particular can rely upon a consistent administrative interpretation of its statutory powers similar to the consistent interpretation found in *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

Finally, the Board argues that unless we uphold its position that resort to 401(g) of the Act is unnecessary it will be confronted with a dilemma in the management of its large-scale area proceedings. In its brief the Board states: "Moreover, Delta's concept, if adopted, would be prejudicial both to the traveling public and the carriers, for in some cases it could only result either in a hasty and largely meaningless passing on reconsideration requests of a highly technical economic nature, or the further postponement of the

¹¹ *Western Air Lines v. CAB*, 194 F. 2d 211 (9 Cir. 1952) involved a Board procedure entirely different from that in the present case. In *Western Air Lines* the Board, subsequent to the effective date of its order approving the transfer of a certificate, imposed labor protective conditions upon the transfer. The Board's power relative to the transfer of certificates is governed by Section 401(h), 49 U.S.C. § 1371(h) rather than Sections 401(f) and 401(g). Under Part II of the Interstate Commerce Act, the Supreme Court has stated that the Commission's power to amend an order approving the transfer of a certificate is more flexible than its power to amend a certificate. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 445-46 (1951), rehearing denied, 341 U.S. 906. In addition, *Western Air Lines* involved misrepresentation in testimony before the Board. There is language in *Smith Bros., Revocation of Certificate*, 33 MCC 465 (1942) indicating that if a certificate has been obtained as a result of misrepresentation it may be revoked without a formal proceeding under Section 212(a), 49 U.S.C. § 312(a).

effective dates of certificates with the attendant deprivation of needed public service and additional carrier revenues, on the small chance that a further review will result in a change of the original decision." We admit the Board's dilemma is real¹¹ but we find that this dilemma is inherent in the statutory scheme of Sections 401(f) and 401(g). It is our view that once a certificate has become effective, the Act requires that the Board resort to more formal—even though possibly more time-consuming—procedures to modify such a certificate, irrespective of whether the modification is entirely in the public interest.

Our holding is not based upon the fact that, prior to the date on which the certificate was modified, Delta inaugurated service authorized by the certificate. Furthermore, we have accepted, *arguendo*, the Board's argument that the language in the order quoted in footnote 4, *supra*, put Delta on notice that the Board purported to reserve to itself power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration.

We hold that under Sections 401(f) and 401(g) of the Federal Aviation Act, absent fraud, misrepresentation or clerical error in the original issuance of the certificate, it is only in a proceeding satisfying the requirements of Section 401(g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions.

Orders No. E-13835, E-14044, and E-14224 are set aside to the extent that they impose restrictions on the certificate of Delta Air Lines, Inc., which became effective on December 5, 1958.

¹¹ We suggest, however, that the Board investigate the possibility of issuing some form of temporary authorization.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October Term, 1959

No. 248

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

LAKE CENTRAL AIRLINES, INC., ET AL., INTERVENORS

JUDGMENT AND DECREE

This cause having come on for hearing on the transcript of the record from the Civil Aeronautics Board, and the Court, upon consideration of the record, briefs and arguments of Counsel, having filed its opinion herein on June 29, 1960, it is

ORDERED, ADJUDGED AND DECREED that the orders of the Civil Aeronautics Board of which review is sought in this case be, and they hereby are, set aside to the extent that they impose restrictions on the certificate of Delta Air Lines, Inc., which became effective on December 5, 1958.

STERRY R. WATERMAN,
LEONARD P. MOORE,
U.S. Circuit Judges.

J. JOSEPH SMITH,
U.S. District Judge.

Dated: July 21, 1960.

A true copy,

A. DANIEL FUSARO,
Clerk.

By NIALL F. O'DOHERTY,
Chief Deputy Clerk.

FILE COPY

Office-Supreme Court, U.S.

FILED

NOV 18 1960

JAMES H. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 492

CIVIL AERONAUTICS BOARD,

Petitioner,

v.

DELTA AIR LINES, INC.,

Respondent.

**BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

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IN THE
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OCTOBER TERM, 1960

No. 492

CIVIL AERONAUTICS BOARD,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

**BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

Delta Air Lines, Inc. (hereinafter called "Delta"), the Petitioner below, prays that this Court will deny the Petition for Writ of Certiorari filed in No. 492 by the Solicitor General, on behalf of the Civil Aeronautics Board (hereinafter both referred to as the "Board" or the "CAB"). The Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered in *Delta Air Lines, Inc., v. Civil Aeronautics Board* (2d Cir. 1960), 280 F. 2d 43.¹

¹ Citations to the Opinion below will be to Appendix A of the Petition in No. 492, e.g., "(App. A. pp. 15-24)." References to material in the printed Joint Appendices will be by page number thereof, preceded either by the symbol "J.A." or by the symbol "Add'l J.A." The symbol "J.A." refers to the white-covered, three-volume Joint Appendix filed in case No. 25,422, etc., in the Court below, and by stipulation made part of the record in this case. The symbol, "Add'l J.A." refers to the blue-covered, single-volume Additional Joint Appendix filed with the Court below in the instant case No. 25,852.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the CAB, after it has entered an order permitting a certificate for public convenience and necessity to become effective under Section 401(f)¹ of the Federal Aviation Act,² which Section provides that a certificate shall be effective "from the date specified therein and shall continue in effect until suspended or revoked as" thereafter provided in the Statute, still has power to alter such a certificate by acting on timely petitions for reconsideration following the CAB-specified certificate effective date, without resort to the procedures specifically provided in the Statute for the modification of effective certificates.

COUNTERSTATEMENT OF THE FACTS

This case involves an administrative proceeding before the CAB known as the *Great Lakes-Southeast Service Case*. That proceeding was concerned with the air service needs of an area extending between the Great Lakes and Florida. Only applications by so-called trunkline carriers were consolidated, as noted in the CAB's Petition (p. 4), but no restrictions were placed upon the trial of those applications which in any way limited the right of the applicants to seek both long-haul rights and also rights to provide more short-haul types of service between intermediate cities in the area under consideration (CAB Orders E-9734, J.A. 78a *et seq.*, and E-10043, J.A. 111a *et seq.*).

In its decision (CAB Order E-13024, September 30, 1958, J.A. 1313a *et seq.*), the CAB added six cities to Delta's

¹ 72 Stat. 754, 49 U.S.C. 1371(f).

² 72 Stat. 731, 49 U.S.C. 1301. Between the time of the Board's initial action and the modification on reconsideration, the Civil Aeronautics Act (52 Stat. 973, 49 U.S.C. 401), was supplanted by the Federal Aviation Act. The provisions of the former Act here involved were re-enacted without change, and there is admittedly no issue stemming from the supplantation of the Civil Aeronautics Act.

existing Route 54, which prior to that time served Chicago and Miami via certain intermediate points, but by-passed Indianapolis. The addition of three of those cities, Dayton, Louisville, and Indianapolis,¹ permitted Delta for the first time to offer service between them and cities in the Southeast and Florida, and also between them and certain other, more nearby points already served by Route 54. Since Indianapolis already was an authorized intermediate point on another Delta Route—Route 8—between New Orleans and Detroit, inclusion of Indianapolis as an intermediate point on Route 54 had the additional effect, which the Board recognized and approved (E-13024, J.A. 1323a and 1346a-1347a), of permitting Delta to serve cities on *both* of these routes on the same flights, provided that the flights stopped at the "route junction point" of Indianapolis.

Although as the CAB's Petition states (p. 4), the agency imposed restrictions on a number of new certifications granted to other applicants in order to protect existing local service carrier operations, *none* of these restrictions were imposed upon the certifications made to Delta.² No restrictions of any kind were imposed upon Delta's new Dayton, Louisville and Indianapolis authorities.

By this CAB order of September 30, 1958, the new Delta certificate incorporating the above-described additional authority was to become effective sixty days thereafter, on November 29, with the proviso that *prior* thereto the Board might extend that effective date upon its own

¹ The addition to Delta's authority of the other three cities, Columbus, Toledo and Detroit, which permitted Delta for the first time to offer service between those cities and the Southeast, has no bearing on the question presented in this case.

² The restrictions which were imposed upon Delta (E-13024, J.A. 1355a-1356a), were all imposed for other reasons not here pertinent.

initiative or in recognition of a timely-filed petition for reconsideration of the September 30 order (J.A. 1384a). The certificates of other carriers which had received new authorizations in the *Great Lakes-Southeast Case* had the same effective date and were made subject to the same proviso (J.A. 1379a, 1388a, 1394a and 1400a).

Petitions for reconsideration were in fact filed by various parties including Lake Central Airlines, Inc. (hereinafter "Lake Central"), and Piedmont Aviation, Inc. (hereinafter "Piedmont"), two local service carriers which were intervenors in the agency proceeding. These two petitions sought, *inter alia*, to have restrictions imposed on Delta's service between ten pairs of cities which, with the addition of Indianapolis, Louisville and Dayton to Route 54, Delta was enabled to serve *without* restriction under the certificate authorized by the CAB's September 30 decision.

Lake Central's petition to the CAB for reconsideration also requested a stay of the effective date of Delta's certificate (then set for November 29, 1958) if necessary in order to allow CAB action on the petition before the certificate went into effect (Add'l J.A. 1591a-1592a). On November 28, 1958, the CAB issued Order E-13211 (J.A. 1469a *et seq.*) which, with one exception, refused to stay the effective date of any new certificate, thus denying the Lake Central plea for stay of the Delta certificate. The CAB assigned two interrelated reasons for its refusal to grant the requested stays. First, after reviewing the various petitions for reconsideration, the CAB found that they did not make sufficient showing of probable legal error or abuse of discretion to justify a stay, except for one exception referred to above. Second, the CAB stated that it wished to have the new services inaugurated in time for the peak period of winter travel (J.A. 1470a-1471a). As the Petition herein notes, the CAB's opinion closed with the statement that Order E-13211 was not a disposi-

tion of the several petitions for reconsideration on their merits (J.A. 1495a-1496a).

The one exception where a stay was granted, involved new authority which had been awarded to Eastern Air Lines. Piedmont, in its petition for reconsideration (in addition to seeking imposition of restrictions upon Delta) also sought to prevent the extension of Eastern's Route 6 from Charleston, West Va., to Chicago. In its opinion accompanying Order 'E-13211, the CAB found that Piedmont's objection to this additional *Eastern* authorization *did* raise serious questions; and it was for that reason that the Eastern certificate's effective date was stayed until further action could be taken by the Board (J.A. 1494a).

For reasons not relevant here, Delta's new certificate actually became effective on December 5, 1958, rather than upon November 29, 1958 (see Add'l J.A. 1593a-1595a). On January 1, 1959, pursuant to schedules filed with the CAB, Delta inaugurated service under the new certificate between Chicago and Indianapolis, with the flights continuing beyond Indianapolis southward to Evansville, Indiana, a city which Delta was authorized to serve on its previous-established Route 8, and shortly thereafter also inaugurated service between Louisville and Indianapolis—services which would not have been permitted under the restrictions which had been requested by Lake Central and Piedmont.¹

On May 7, 1959, over five months after Delta's new, unrestricted authority became fully effective, and four months after Delta inaugurated new services pursuant to schedules filed with the CAB, the agency issued the order

¹ By informal agreement with the CAB, Delta has refrained from inaugurating additional service in these ten markets (except such as would be permitted even if the restrictions were imposed), pending resolution of this proceeding.

of which complaint was made in the Court below (E-13835, J.A. 1509a *et seq.*). This order purported to constitute the CAB's formal disposition of the various petitions for reconsideration of the September 30 decision which had been left pending when the certificate was allowed to take effect. The order did in fact modify the former decision, one modification being the imposition upon Delta of the restrictions requested by Lake Central and Piedmont, so that a Delta flight serving any of one of the ten pairs of cities mentioned in those carriers' petitions was thereafter required to originate at Atlanta or at a point on Route 54 south thereof. One effect of the restrictions was to render illegal the services which Delta already had inaugurated in good faith between Evansville and Chicago via Indianapolis and between Indianapolis and Louisville.

Upon Petition by Delta, the Court below stayed the effectiveness of Order E-13835 and, in its later decision, held that the CAB was without power to impose the additional restrictions upon Delta's certificate by means of reconsideration after the certificate had become effective.

ARGUMENT

The CAB presents what appear to be three different grounds for seeking review by this Court, namely, (a) that the decision below gave an erroneous construction to the language of Sections 401(f)¹ and 401(g)² of the Federal Aviation Act (Petition, pp. 7, 8-10); (b) that the decision below conflicts with prior decisions of this Court and of other Circuits (Petition, pp. 9-10); and (c) that the decision below "cannot fail to impair the administrative process" (Petition, pp. 7, 8, 11-12). Delta will show that not one of these grounds contains any substance which would justify a review of the Second Circuit's decision.

¹ 72 Stat. 754, 49 U.S.C. 1371(f).

² 72 Stat. 754, 49 U.S.C. 1371(g).

It will be shown that the decision below is in full accord with prior decisions by this Court and, indeed, with a long line of court and administrative agency decisions; that the Court's construction of the pertinent Federal Aviation Act provisions was eminently correct; and that the decision below in no manner will impair the administrative process. The CAB just disagrees with the conclusion of the Court below; but such disagreement forms no basis for issuance of a Writ of Certiorari. As this Court said in *Magnum Import Company v. De Spoturno Coty*, 262 U.S. 159, 163 (1923);

"The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ . . ." (Emphasis added).¹

I. The Decision Below Properly Construed and Applied the Language of the Federal Aviation Act.

When reduced to its essence, the decision below is merely this: Because the CAB is a creature of Congress,

¹ Although the *Magnum* case was decided before the amendments made by the Judiciary Act of 1925, the force of the above-quoted language has not been vitiated. The essence of the Act of 1925 was curtailment of this Court's appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions (*Ex Parte Republic of Peru*, 318 U.S. 578, 600 [1943]). Furthermore, the quoted language from *Magnum* has been cited with approval within just the past few years, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

its "powers are purely statutory," *Seatrains Lines, Inc. v. United States*,¹ and it therefore can act only "... as specifically authorized by Congress," *United States v. Seatrain Lines*.² As the Court below recognized (App. A to CAB Petition, p. 20), the *Seatrains* case involved a situation analogous to the one involved here. The decision below, therefore, merely applied well-settled law to the clear and unambiguous language of Sections 401(f) and 401(g) of the Federal Aviation Act. It rejects, as did *Seatrains*, an agency attempt to read into its organic statute a power which Congress chose not to grant explicitly—a power which would create an *implied* exception to a limitation which Congress clearly *did* impose.

The limitation which Congress imposed is upon the CAB's power to modify certificates once they are granted. Congress specified in Section 401(f) that:

"Each certificate shall be effective *from the date specified therein*, and shall continue in effect until suspended or revoked as *hereinafter provided* . . ." (Emphasis added)

And as the Court below held—a holding which the CAB does not contest—the next succeeding Section, Section 401(g), is the only provision in the Act which expressly deals with the modification of effective certificates (App. A, p. 20). Section 401(g) admittedly was not followed here.

The implied exception to the unqualified³ language of

¹ 64 F. Supp. 156, 160 (D.C. Del. 1946), *aff'd.*, *United States v. Seatrain Lines*, 329 U.S. 424 (1947).

² 329 U.S. 424, *supra*, at 433.

³ Although Section 401(f) does state three exceptions to its rule as to the inviolability of certificates after the effective dates specified therein, none of them are applicable here: a certificate conferring temporary authority ceases to be effective upon the expiration of its term; a certificate will cease to be effective if the

these two Sections for which the CAB contends, would allow "reconsideration" of effective certificates where, on the date a certificate is made effective, the CAB has not yet disposed of previously filed petitions for reconsideration of the underlying agency decision.

As will be seen, there is no basis upon which any such exception can be founded. It might first be noted, however, that there is no merit to the CAB's position that the Second Circuit decision will render difficult the reconsideration of CAB route case decisions. The CAB's argument constitutes an attempt to amend the Statute on the basis of administrative expediency—an attempt to secure more time for the reconsideration process whether or not a certificate has gone into effect. Affirmance of such a position, of course would destroy the chief aim of Congress in providing for certificates in the first place—to give the carriers route security (*Lea*, 83 Cong. Rec. 6407 [1938]). In any event, the statute as *now* written gives the CAB all the time needed to reconsider its decisions without impairing the value of certificates once made effective.

Thus, the CAB now has three courses of action open to it, each of which would be in full accord with the law: (a) to act on petitions for reconsideration within the sixty-day grace period before certificate effectiveness for which new certificates invariably provide (see, *e.g.*, J.A. 1379a, 1384a, 1388a, 1394a, and 1400a); (b) to allow for a longer grace period than sixty days in new certificates in any instance where the complexity of the proceeding indicates that reconsideration might involve protracted consideration of difficult issues; or (c) to further extend (stay)

Board certifies that operations under the certificate have ceased; and if the carrier fails to inaugurate service authorized by a certificate within 90 days of authorization, the Board upon notice and hearing may revoke the unused authority (see App. A to CAB, Petition, p. 20).

the effective date of a new certificate if, as the end of the originally-specified grace period is approached, it appears that additional time will be needed for reconsideration. Any one of these steps will provide for full completion of the administrative process *without* departure from the Statute as now written and without violation of the certificate holder's rights to due process.

Furthermore, none of these three courses of action will unduly impede the administrative process. This is evident from the fact, to be explained below, that heretofore the CAB *has* consistently followed steps (a) and (c) as outlined above, with no discernible adverse effect upon its discharge of the responsibilities imposed upon it by Congress.¹ This case, therefore, does not have to be approached, and it was not approached by the Court below, on the basis that denial of the position urged now by the CAB will curtail administrative freedom.

The CAB is unable to point to any specific language in Section 401(f), Section 401(g), or elsewhere in the Statute which states the implied exception for which it contends—or, indeed, which even mentions reconsideration of certificates under any circumstance. The Board does point to the language underscored in the following quotation from this Court's opinion in the *Seatrain* case, *supra*, 329 U.S. 424 at 432-433 (CAB's Petition, p. 11):

“... The certificate, when finally granted *and the time fixed for rehearing it has passed*, is not subject to revocation in whole or in part except as specifically authorized by Congress . . .” (Emphasis added).

The underscored language, however, is inapplicable in a proceeding under the Federal Aviation Act.

¹ For a discussion of the fact that the law as applied by the Court below will not mean frustration of the administrative process, see *Ryan, Revocation of an Airline Certificate*, 15 Journal of Air Law and Commerce, pp. 377-389, at 389 (1948). The author is a former chairman of the Civil Aeronautics Board.

The quoted language was concerned with a certificate issued under the Water Carrier Act.¹ Contrary to the Federal Aviation Act, that Act does not specify the date upon which a certificate shall become effective, nor does it lay down a procedure for modifying a certificate once issued (see *United States v. Seatrain Lines, Inc.*, *supra*, 329 U.S. at 430). Moreover—again contrary to the Federal Aviation Act—the Water Carrier Act *does* contain elaborate provisions with respect to rehearing, reargument, and reconsideration of agency decisions, orders, and requirements.² These two factors account for the Court's reference to the passing of "the time fixed for rehearing."

The Board also tries to find support for its position in Sections 204(a) and 1005(d) of the Federal Aviation Act.³ These two Sections, however (which are set forth in the Appendix to this Brief), merely allow the Board, except as otherwise provided in the Statute, to "amend", "modify", or "suspend" its "orders." Because this broad and *general* language is the only thing in the Federal Aviation Act which even approaches provision for reconsideration of CAB actions, it is clear that it cannot modify the *specific* language of Sections 401(f) and 401(g) which, unlike the Water Carrier Act provisions, *do* prescribe with precision when a certificate shall become effective and do carefully outline the procedure thereafter to be followed in the event that it is desired to consider possible revision of an effective certificate.

Moreover, the *Seatrain* case, upon which the Board itself relies, makes it clear that such broad language as that

¹ 54 Stat. 929 *et seq.*, 49 U.S.C. 901 *et seq.*

² Section 316(a) of that Act, 54 Stat. 946, 49 U.S.C. 916(a) incorporating Section 17(6) of the Interstate Commerce Act, 24 Stat. 385, 49 U.S.C. 17(6).

³ 72 Stat. 743, 49 U.S.C. 1324(a), and 72 Stat. 794, 49 U.S.C. 1485(d), respectively.

contained in Sections 204(a) and 1005(d), referring merely to "orders," cannot be used to create a power to reconsider effective *certificates*. The *Seatrain* case rejected a similar argument. In that case, the Interstate Commerce Commission relied upon substantially identical language in the Water Carrier Act in attempting to create for itself a power to modify certificates which Congress had not specifically granted. This Court held (329 U.S. at 432):

"Nor do we think that the Commission's ruling was justified by the language of Sec. 315(c), 49 USCA Sec. 915(c), 10A FCA title 49, Sec. 915(c), which authorizes it to 'suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.' *That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used in the Act.* Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word 'order.' Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word 'certificate.' . . . It is clear that the 'orders' referred to in 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. *But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding . . .*" (Emphasis added).

As noted earlier, this Court went on to hold that *certificates* can be modified *only* in the manner *specifically* authorized by Congress.¹

¹ Application of this Court's interpretation in the *Seatrain* case of the Interstate Commerce Act provisions to the similar language of Section 1005(d) of the Federal Aviation Act is reinforced by

Thus, the *Seatrain Case*, rather than providing support for the CAB's present attempt to escape from its statutory limitations through the creation of an implied exception to Section 401(f), clearly supports the contrary ruling of the Court below.

The *Seatrain Case* was not the first time, nor the last, that in analogous situations it has been decreed that an agency must follow procedures specifically prescribed by Congress, and not attempt by inference to create for itself other powers not expressly conferred. Thus, in *Seatrain*, this Court cited an earlier decision by the Interstate Commerce Commission under the language of Section 212(a) of the Motor Carrier Act,¹ which Section is substantially similar in content to Section 401(f) and 401(g) of the Federal Aviation Act (Section 212[a] of the Motor Carrier Act is set out in full in the Appendix hereto). As this Court put it:

"... in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in Section 212 (a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Re Smith Bros. Revocation of Order*; 33 MCC (F) 465" (329 U.S. 429, at 430-431).

As the Interstate Commerce Commission had put it in the *Smith Bros.* case itself:

"... We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefore appears and until all

the very next Section of the latter Statute, Section 1005(e), 72 Stat. 794, 49 U.S.C. 1485(e). In that Section Congress specifically mentioned "certificates" separately from "orders", implying clearly that the two terms cannot be read as having the same meaning. Section 1005(d) mentions only "orders."

¹ 49 Stat. 555, 49 U.S.C. 312(a).

controversy is determined, but *once a certificate, duly and regularly issued, becomes effective our authority to terminate it is expressly marked off and limited.* All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated but *the certificate marks the end of the proceeding*, just as the entry of a final judgment or decree marks the end of a court proceeding . . ." (Emphasis Added).

In exact accord, see *Hergott v. Nebraska State Ry. Commission*, 15 N.W. 2d 418, (Neb., 1944).

One of the more important decisions decided since the *Seatrain* case is *Watson Bros. Transportation Company v. United States*, 132 F. Supp. 905 (D. Neb. 1955), affirmed by this Court, 350 U.S. 927 (1956). A three-judge District Court in that case ruled, under those provisions of the Motor Carrier Act which are similar to Sections 401(f) and 401(g) of the Federal Aviation Act, that:

" . . . The only statutory authority for the suspension, change, or revocation of such a certificate by the Commission is contained in Section 212(a) . . .

" . . . Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212(a), it is invalid.

" . . . the order . . . is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued" (132 F. Supp. 905 at 909).

In the *Watson* case there was a deliberate attempt by the Interstate Commerce Commission to implement a change of heart through modification, without notice and hearing, of a previously-effective certificate.

Except for the fact that no petition for reconsideration had been filed (the Commission acted on its own motion) the *Watson* case is on all fours with this one. As the Court below found (App. A, to Petition herein, p. 21) findings which are not contested by the CAB—in this

case there is no suggestion of inadvertent error, no suggestion that at the time it was put into effect Delta's certificate mistakenly contained greater authority than the CAB intended to confer. The Court further found it to be "affirmatively clear" that when the CAB refused, just prior to the certificate's effective date, to extend that date as other parties had requested in order to permit reconsideration, the CAB was fully aware of the arguments which subsequently led it on May 7, 1959 (five months after the certificate became effective, and four months after Delta inaugurated service under that certificate) to impose the restrictions of which Delta complains.

The fact is, therefore, that in the interim the CAB changed its policy, an arbitrary—or at least unilateral—administrative determination which did not and cannot invest the CAB with authority to modify an effective certificate without adherence to Section 401(f) and 401(g) procedures, *United States v. Watson Bros. Transportation Company, Inc.*, *supra*; *American Trucking Associations, Inc. et al. v. Frisco Transportation Company*, 358 U.S. 133, 146 (1958). Clearly, the Board's actions were all taken deliberately, and, like the Interstate Commerce Commission action involved in *Watson*, constitute an invalid attempt, contrary to specific statutory limitations, to change a certificate duly issued.

The CAB makes the sweeping statement to this Court that the agency "has previously modified, upon reconsideration, certificates which it had allowed to become effective" (Petition, p. 10, footnote 7). It then purports to cite five "examples" of this alleged past course of conduct (*ibid*). The fact is, however, that these five "examples" are the only previous instances known to Delta out of the hundreds and hundreds of cases decided by the CAB where such action even was attempted. And, as the Court below found (App. A to the CAB Petition, p. 23, footnote 11), even of those five "examples," one is not in point.

Furthermore, in none of the remaining four instances did the affected carrier raise any objection to the CAB's attempted modification.

The four uncontested "examples" constitute only scattered *exceptions* to a *consistent* and *contrary* course of conduct by the CAB ever since 1948—a course of conduct which clearly has constituted agency recognition of its *lack* of power to reconsider an effective certificate. In its *Kansas City-Memphis-Florida Case*, 9 C.A.B. 401 (1948), the CAB said:

"... We have grave doubt, however, as to our possession of such power..." (9 C.A.B. 401 at 408-409).

In view of this doubt, the agency went on to announce that:

"... in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case" (*ibid.*).

Since rendering this decision, the CAB consistently has made new certificates effective sufficiently long after the decision date, usually sixty days (as in this case), to permit reconsideration if requested, and has conditioned even such an advance effective date upon a power reserved unto itself to extend the date further if necessary to allow additional study of petitions for reconsideration. Moreover, in cases decided before this one, the CAB repeatedly has used this power to postpone the effective date of certificates during reconsideration. (The cases are collected at pages 29-32 of Delta's Brief, and at pages 9-12 of Delta's Reply Brief, to the Court below.)

Indeed, as the Second Circuit found (App. A to CAB's Petition pp. 22-23), the CAB even has represented to at least one court that it has been the agency's practice here-

tofore to stay a certificate's effective date if necessary to give it time to consider the merits of petitions for reconsideration; *Southwest Airways v. Civil Aeronautics Board* (9th Cir. 1952), 196 F. 2d 937, 938. Moreover, just the week before last, the CAB issued an order in another proceeding (the *Great Lakes Local Service Investigation*, CAB Docket 4251), in which the CAB again recognized that unless it stays the effective date of certificates until it can dispose of petitions for reconsideration, it will lose the power to do so. Except for the actual ordering language staying the effectiveness of the new certificates there involved, that order in its entirety reads as follows:

"Various petitions for reconsideration of the Board's decision in the above-entitled proceeding. (Order E-15695, dated August 25, 1960) have been filed and it appears that the Board's consideration of these petitions will not be completed until after November 8, 1960, the date presently fixed for making effective the amended certificates issued as part of the Board's decision herein. In order to preserve the status quo until the Board has had adequate opportunity to dispose of the aforementioned petitions, we find that it is in the public interest to stay the effectiveness of the certificates in question" (Order E-15995, November 4, 1960).

The CAB's action in the instant proceeding was an arbitrary departure from its normal practice.

In its Petition to this Court (pp. 10-11), the CAB also says that its order refusing to stay the effective date of Delta's certificate,¹ "left open the question of modification" raised by the petitions of others for reconsideration. This apparently is a contention by the CAB now that it reserved the power to modify Delta's certificate. It has tucked a statement to this effect into footnote six at page nine of the Petition, referring to an alleged "express

¹ Order E-13211, (J.A. 1469a).

reservation" in the order denying stay of power to modify the certificate. Similarly, in the Question Presented at page two of the Petition, the Board says that this situation is one "where the Board's order expressly reserved the right to make such modification."

This is the *first* time that the agency has made any specific claim that it actually reserved the power to "reconsider" Delta's final and effective certificate. Compare the Question Presented by the companion Petition for Writ of Certiorari in No. 493. The Board apparently relies upon the following statement from the decision below (App. A to CAB Petition, p. 24):

"... Furthermore, we have accepted, *arguendo*, the Board's argument that the language in the order quoted in footnote 4, *supra*, put Delta on notice that the Board purported to reserve to itself power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration."

The quoted language, even for purposes of argument, does not constitute recognition of any actual reservation of power. It merely says that the CAB "put Delta on notice" that it "purported" to reserve such power. *The mere fact that the CAB served notice, however, that it intended to act in violation of the statutory scheme did not give it power to do so.*

Even if the Board had made an actual reservation of power in the certificate itself, the decision below would remain correct. The Board cannot by a voluntary *ex parte* action, create powers for itself which Congress has withheld; it cannot, by a "reservation," empower itself to ignore the provisions of Section 401(f) and 401(g). In *United States v. Rock Island Motor Transit Company*, 340 U.S. 419 (1951), this Court sanctioned use of an express reservation, which had been written into a Motor Carrier certificate. The purpose of that reservation was to allow the Interstate Commerce Commission to tighten

up original restrictions, if necessary, which were designed to limit the carrier to services auxiliary to the railroad operations conducted by its parent company. The Court noted that actual changes or revocations may be made in motor carrier certificates only under Section 212 of the Motor Carrier Act (340 U.S. 419 at 426), a section which, as seen above, is substantially similar to Sections 401(f) and 401(g) of the Federal Aviation Act. In passing upon the Commission's action, the Court stated, therefore, that even

"... such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will. That would violate Sec. 212, allowing suspension, change or revocation only for the certificate holder's willful failure to comply with the Act or lawful orders or regulations of the Commission . . ." (340 U.S. 419 at 435).

In summary, as the foregoing shows, the Court below properly construed the provisions of the Federal Aviation Act, in conformity with a long line of judicial and administrative decisions. The CAB just disagrees with the outcome; but such disagreement is not a sufficient reason for burdening this Court with a review of the Second Circuit's action, *Magnum Import Company v. De Spoturno City*, *supra*.

II. The Decision Below Does Not Conflict With Prior Decisions of this Court or of Other Circuits.

The foregoing also shows that the CAB's charge of inconsistency between the decision below and the prior decisions of this Court in the *Seatrains*, *Watson Bros.*, and *American Trucking Association* cases, all *supra* (Petition p. 10), clearly is without foundation.

Nor does the decision conflict with any opinion of another Court of Appeals. In point of fact, it could not do so because this is the first time that the question here

involved has been raised and specifically decided in a Court case involving the Federal Aviation Act or its predecessor, the Civil Aeronautics Act.¹ While a somewhat similar question, among many unrelated questions, was raised in *Frontier Airlines, Inc. v. Civil Aeronautics Board* (D.C. Cir. 1958), 259 F. 2d 808, cited at page nine of the CAB's Petition, that case did not involve the precise same issue raised here concerning diminution of the complainant's effective authority on reconsideration. More important, perhaps, the Court in *Frontier* did not purport to rule upon any related issue (and thus did *not* "reject" the position properly adopted by the Court below in this case, as alleged at page nine of the CAB's Petition). In this respect the Court in *Frontier* merely decided a question as to the CAB's power to act upon petitions for reconsideration—and even then only with the Court's approval—after a petition for *judicial review* had been filed.

As the Court below found (App. A to CAB Petition, p. 23), the only other case cited by the CAB as allegedly being inconsistent with that Court's decision, *Western Air Lines, Inc. v. Civil Aeronautics Board* (9th Cir. 1952), 194 F. 2d 211 (Petition, pp. 9-10), "involved a Board procedure entirely different from that in the present case."

Clearly, then, there is no inconsistency between the decision below and that rendered by any other Court of Appeals. To the contrary, as the Court below pointed out (and as shown hereinabove) the decision accords fully with a long line of prior cases both in this Court and in the various Courts of Appeals.

¹ 52 Stat. 933, 49 U.S.C. 401.

III. The Decision Below in No Manner Will Impair the Administrative Process.

The Board's charge that the decision below will impair its administrative responsibilities is not an argument properly directed to this Court.

As long as the decision comports with the Statute and with the decided case law, as it does, any policy problems thereby created for the Board are for Congress to resolve. This Court heretofore has rejected a CAB argument that it should be allowed to depart from its governing statute for reasons of policy, *Delta Air Lines, Inc. v. Summerfield*, 347 U.S. 74 (1954). The Court told the Board that there, as here, it had misconceived its remedies:

"The Board makes an extended argument of policy against that position in elaboration of the reasons it advanced for not offsetting the excess earnings from domestic operations against the international subsidy rate. . . . It maintains that maximum operating efficiency on the part of air carriers and the development of air transportation—prominent objectives of the Act . . . —will be better served by setting subsidy rates on a divisional rather than on a system basis. This may be so. But that is a matter of policy for Congress to decide. As we read Sec. 406(b), Congress adopted in the present act a rate formula based on 'the need' of the carrier as measured by its entire operations, even when a rate was being fixed for a class of service" (347 U.S. at 79-80; emphasis added).

So it is here. Congress has prescribed a definite procedure for changing an effective certificate, whether the change is to be revocation or modification (App. A to CAB Petition, p. 21). It did so because either type of change could seriously affect valuable operating and property rights.

Not only are the Board's policy appeals thus irrelevant, but in various respects they are incorrect. The Board

complains, for example, that a consequence of the decision below may be "unduly hasty decision on requests for reconsideration raising complex problems" (Petition, p. 11). That is not true.

As mentioned herein, earlier, the CAB invariably makes new certificates effective 60 days after the date of the granting decision, in order to allow sufficient time for reconsideration (see, for example, J.A. 1379a, 1384a, 1394a, and 1400a). The CAB requires petitions for such reconsideration to be filed within 20 days after the decision, and answers thereto 10 days later, leaving the CAB 30 days during which to act upon those petitions without worrying about the original effective date.¹

If a proceeding should be so complex as to indicate that the resulting thirty days will be insufficient, the CAB can always write a longer grace period than sixty days into a new certificate when it is granted. If this is not done, and the thirty-day period actually proves to be inadequate in any particular case, all the Board has to do—as this Answer has shown it has done time after time in the past—is to extend the effective date of new certificates until it finishes its job of reconsideration.²

¹ CAB Rule 37(a), 14 C.F.R. 302.37. At the time the agency case here involved was decided, 30 days were allowed for filing petitions for reconsideration. Thereafter, CAB Rule 37 was amended (PR-34, adopted by CAB on February 11, 1959), so as to reduce the time for filing to 20 days, in order to give the Board and its staff more time "... when some action by the Board is necessary or desirable before any new or amended certificates take effect" (*ibid*).

² Such action also would resolve all problems raised by the CAB in footnote eight at page eleven of the Petition, with respect to the proper time for appeal to the Courts in a situation where reconsideration is not completed within the sixty-day period now usually allowed between the date of decision and the effective date of a new certificate. (This period, it should be noted, coincides exactly with the period allowed in the Statute for taking appeals from a final CAB order, Section 1006(a) of the Federal Aviation Act, 72 Stat. 795, 49 U.S.C. 46(a).)

Indeed, in this case, in the very same order in which the Board refused to stay the effective date of Delta's certificate, it *did* extend the effective date of a new certificate granted to another carrier because in that one instance it found that a petition for reconsideration had raised a point sufficiently valid to perhaps require revision of the certificate (Order E-13211, J.A. 1471a, 1494a, and 1496a). No such finding was made in the case of Delta's certificate.

Clearly, "hasty reconsideration" need not result from the decision below. A former chairman of the CAB has pointed out that the view of the law properly applied by the Second Circuit "does not mean frustration of the Board's ability to reconsider its decisions in certificate cases," Ryan, *Revocation of an Airline Certificate, supra*, 15 Journal of Air Law and Commerce, at 389.

The Board also complains that further stay of a certificate's effective date might in some cases disable the Board from authorizing needed services while petitions for reconsideration are pending (Petition, p. 11). This reliance upon the need for hasty implementation of newly-granted authority is specious. In this case, for example, the administrative proceeding commenced on May 25, 1955 (J.A. 1a). The CAB took three years and four months to reach a decision (on September 30, 1958, J.A. 1313a). Surely, an additional short delay to permit reconsideration, if the Board had seriously intended to reconsider Delta's certificate, would not have been crucial after all that time. *Furthermore, the Board can stay only a portion of a new award, if it desires to put uncontested portions into effect while giving more thought to those parts concerning which reconsideration has been sought* (see the CAB's invitation to Eastern Air Lines, Inc., in this very case, Order E-13211, J.A. 1494a).

CONCLUSION

This Brief in Opposition has shown that no substantial reason has been presented by the CAB for review of the decision below. That decision properly construes the provisions of the Federal Aviation Act. It is consistent with, and follows, a long line of decisions by this Court, by other Courts of Appeals, and by administrative agencies—including decisions by the CAB itself prior to the proceeding here involved. The decision below in no manner will impair or impede the administrative process. It merely requires compliance by an agency with the limitations imposed upon it by Congress when Congress created the agency.

For the foregoing reasons, Delta Air Lines, Inc., respectfully submits that a Writ of Certiorari should not issue in No. 492.

Respectfully submitted,

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A 1

APPENDIX A

Statutes and Regulations Involved

- I. *Federal Aviation Act of 1958*, 72 Stat. 737 *et seq.*, 49 U.S.C. 1301 *et seq.*

A. *Section 204(a)*

GENERAL AUTHORITY

"The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act."

(72 Stat. 743, 49 U.S.C. 1324[a])

B. *Section 401(f)*

EFFECTIVE DATE AND DURATION OF CERTIFICATE

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided . . ."

(72 Stat. 754, 49 U.S.C. 1371[f])

C. *Section 401(g)*

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

"The Board upon petition or complaint or, upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public con-

venience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

◇ (72 Stat. 754, 49 U.S.C. 1371[g])

D. *Section 1005(d)*

SUSPENSION OR MODIFICATION OF
ORDER

"Except as otherwise provided in this Act, the Administrator or the Board is empowered to suspend or modify their orders upon such notice and in such manner as they shall deem proper."

(72 Stat. 794, 49 U.S.C. 1485[d])

E. *Section 1005(e)*

COMPLIANCE WITH ORDER REQUIRED

"It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the . . . Board under this Act affecting such persons so long as the same shall remain in effect."

(72 Stat. 794, 49 U.S.C. 1485[e])

II. *Interstate Commerce Act*, 24 Stat. 379, as amended,
49 U.S.C. 1 *et seq.*

A. *Sections 17(6), 17(7) and 17(8)*

REHEARING, REARGUMENT, OR
RECONSIDERATION OF DECISIONS,
ORDERS AND REQUIREMENTS

"(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for reconsideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this

paragraph, any application for rehearing, reargument or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing."

REVERSAL OR MODIFICATION AFTER REHEARING, ETC.

"(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order."

STAY OF DECISIONS, ETC., NOT EFFECTIVE AT TIME OF APPLICATION FOR REHEARING, ETC.

"(8) Where application for rehearing, reargument, or reconsideration of a decision, order or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision,

order, or requirement has not yet become effective, the decision, order or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division, but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

(24 Stat. 385, as amended, 49 U.S.C. 17(6), (7) and (8)).

III. *Motor Carrier Act* (Part II of Interstate Commerce Act), 49 Stat. 543, as amended, 49 U.S.C. 301 *et seq.*

A. *Section 212(a)*

SUSPENSION, CHANGE, REVOCATION AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

"Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: . . ."

(49 Stat. 555, as amended, 49 U.S.C. 312[a])

IV. *Water Carrier Act* (Part III of Interstate Commerce Act), 54 Stat. 929, 49 U.S.C.A. 901 *et seq.*

A. *Section 316(a)*

"The provisions of section 17 . . . of this title shall apply with full force and effect in the administration and enforcement of this chapter."

(54 Stat. 946, 49 U.S.C. 916[a])

V. *Regulations of the Civil Aeronautics Board*, 14 C.F.R. 302.1 *et seq.*

A. *Rule 37*

"(a) *Time for Filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within twenty (20) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. . . ."

(14 C.F.R. 302.37)

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MAR 20 1961

JAMES R. BROWNING, Clerk

No. 492

In the Supreme Court of the United States

OCTOBER TERM, 1960

CIVIL AERONAUTICS BOARD, PETITIONER

v.

DELTA AIR LINES, INC.

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE CIVIL AERONAUTICS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 492

CIVIL AERONAUTICS BOARD, PETITIONER

v.

DELTA AIR LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD

OPINION BELOW

The opinion of the court of appeals (R. 98-107) is reported at 280 F. 2d 43. ●

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1960 (R. 107). The petition for a writ of certiorari, filed on October 19, 1960, was granted on December 12, 1960 (364 U.S. 917; R. 108). The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, once it has entered an order permitting a certificate of public

convenience and necessity to become effective, is without power thereafter, in the same proceeding, to modify the certificate in response to a timely petition for reconsideration filed prior to the effective date of the certificate.

STATUTE AND REGULATIONS INVOLVED

Sections 401 (f) and (g) of the Federal Aviation Act (72 Stat. 755-756, 49 U.S.C. 1371 (f) and (g)) provide:

EFFECTIVE DATE AND DURATION OF CERTIFICATE

(f) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased; *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

Section 302.37 of the Rules of Practice of the Civil Aeronautics Board, 14 C.F.R. 302.37 (1956 Rev. ed.), provides:¹

§ 302.37 *Petition for reconsideration*—(a) *Time for filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within thirty (30) days after the date of service of a final order by the Board in such proceeding unless the

¹ The rule was amended on February 14, 1959, in respects not here relevant. See note 7, p. 13, *infra*.

time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. After the expiration of the period for filing a petition, a motion for leave to file such petition may be filed; but no such motion shall be granted except on a showing of unusual and exceptional circumstances, constituting good cause for failure to make timely filing. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition.

(b) *Contents of petition.*—A petition for reconsideration, rehearing, or reargument shall state, briefly and specifically, the matters of record alleged to have been erroneously decided, and the ground relied upon, and the relief sought. If the petition is based, in whole or in part, on allegations as to the consequences which would result from the Board's order, the basis of such allegations shall be set forth. If the petition is based, in whole or in part, on new matter, such new matter shall be set forth, accompanied by a statement to the effect that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision.

(c) *Successive petitions.*—A successive petition for rehearing, reargument, or reconsidera-

tion filed by the same party or parties, and upon substantially the same ground as a former petition which has been considered or denied by the Board, will not be entertained.

STATEMENT

The present controversy arises out of the so-called *Great Lakes-Southeast Service* case, a proceeding in which the Civil Aeronautics Board considered the long-haul service needs of an area extending roughly between the Great Lakes and Florida and the applications of numerous trunkline carriers seeking to serve these needs. In order to keep the administrative proceedings within manageable bounds, the Board declined to consolidate a number of applications which had been filed by various carriers to provide new and improved short-haul service between certain intermediate cities in the area. (R. 5). Instead, it directed the institution of a separate proceeding (*Great Lakes Local Service Investigation*, Docket No. 4251) on those applications. In order to insure that the separation of the two proceedings would not deprive the existing local-service carriers of their rights under *Ashbaker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, and to give those carriers an opportunity to show the effect of a grant upon their existing operations, the Board permitted the local carriers to intervene in the long-haul proceeding (R. 5-6).

The Board's decision in the long-haul proceeding (R. 11-53) made a number of awards, including one permitting the respondent, Delta Air Lines (Delta);

(1) to extend an existing route northwest so as to provide service from Detroit to Miami and (2) to add Indianapolis and Louisville as intermediate points on its existing Chicago-to-Miami route. Although the Board imposed certain restrictions on a number of the new awards (including the authorization to Delta, R. 51) so as to protect local service carriers,² it did not impose such restrictions with respect to a number of intermediate points on the long-haul routes Delta was authorized to serve.

The Board's decision and order in the long-haul *Great Lakes-Southeast Service* case was issued on September 30, 1958 (R. 11), and provided that the certificates issued pursuant thereto were to become effective on November 29, 1958, unless postponed by the Board prior to that date (R. 56). Within the thirty days then prescribed by the Board rules (see § 302.37 of the Board Rules of Practice, 14 C.F.R. 302.37, 1956 Rev. ed., *supra*, pp. 3-5), Lake Central Airlines and Piedmont Aviation, local carriers which had been permitted to intervene in the long-haul proceeding to protect their interests (R. 3, 5-6), filed timely petitions for reconsideration. These petitions sought to impose on Delta's service to some ten pairs of cities³ a requirement that service to those points

² These restrictions normally preclude so-called "turnaround" service between two points by requiring that service between these points be only on a flight originated or terminated in some distant city. (See, *e.g.*, R. 51).

³ The ten pairs of cities in issue were: Indianapolis-Chicago; Indianapolis-Louisville; Indianapolis-Cincinnati; Indianapolis-Lexington; Indianapolis-Asheville; Dayton-Lexington; Dayton-Asheville; Cincinnati-Louisville; Louisville-Lexington; and Louisville-Asheville.

originate or terminate at some distant city (R. 88-93). Lake Central also asked that the effective date of Delta's certificate be stayed pending a Board decision on the petitions for reconsideration (*id.* at 92-93).

On November 28, 1958, one day prior to the proposed effective date of the certificates, the Board issued a lengthy memorandum and order (E-13211, R. 57-80) in response to numerous requests for stay which had been filed in connection with sixteen petitions for reconsideration addressed to its September 30 decision (R. 57-58, note 1). With one exception,* these stays were denied, the Board concluding that "the parties have not made a sufficient showing of probable legal error or abuse of discretion in our decision" and that in view of the advent of the peak winter season the "new services to Florida are immediately required", a consideration which the Board felt "clearly weights the scale * * * in favor of a denial of the requested stay" (R. 58-59). But the Board made clear that "because of the detailed matters raised in the petitions for reconsideration, it will not be possible to finally dispose of them until after November 29" (R. 58). It stated further that denial of the stays "is in no way prejudicial to the legal rights of those parties seeking reconsideration. Nothing in the present order forecloses the Board from full and complete consideration of the pending peti-

* The exception was with respect to a certificate awarded to Eastern Air Lines. This certificate was stayed because of the serious questions raised by the petition for reconsideration and, also, "because of a strike * * * Eastern in any event is presently unable to inaugurate service * * *" (R. 78).

tions for reconsideration on their merits" (R. 80).⁵

On May 7, 1959, the Board issued an order (E-13835) disposing of the petitions on their merits (R. 81-87). This order, which gives rise to the present controversy, granted the petitions of Lake Central and Piedmont and imposed restrictions on Delta's certificate which preclude operations between the ten designated pairs of cities unless the flights originate or terminate at Atlanta or a point south thereof (*id.* at 83-84, 87). In imposing these restrictions, the Board noted that "[i]f, after deciding the issues presented in *Great Lakes Local Service Case*, we conclude that the long-haul restrictions are not required, we will have full freedom to remove them at that time" (*id.* at 83).

The court of appeals reversed, holding that the Board, once it permits a certificate to become effective, is thereafter without power, in the same proceeding, to add restrictions to the certificate, even in response to a timely petition for reconsideration filed prior to the effective date of the certificate (R. 98-107). The court assumed that Delta was "on notice" that the Board might "modify the certificate on the basis of matters set forth in the filed petitions for reconsideration" (*id.* at 106), stating that its "holding is not based upon the fact that, prior to the date

⁵ The awards actually became effective on December 5, 1958, because of a temporary stay granted by the Board (R. 94-95) to enable the court of appeals to consider a stay request addressed to it by Eastern Air Lines in its unsuccessful efforts to challenge the basic awards in the proceeding. See *Eastern Air Lines v. Civil Aeronautics Board*, 271 F. 2d 752 (C.A. 2), certiorari denied, 362 U.S. 970.

the certificate was modified, Delta inaugurated service authorized by the certificate" (*ibid.*).² Its view was that Sections 401 (f) and (g) of the Federal Aviation Act require the conclusion that, in the absence of fraud, misrepresentation or clerical error, a certificate which the Board has permitted to become effective can thereafter be modified only in a new proceeding satisfying the requirements of Section 401(g) (*ibid.*).

SUMMARY OF ARGUMENT

The changes in a certificate of public convenience and necessity to which the procedures prescribed in Section 401(g) apply are those occasioned by conditions arising *after* completion of the proceeding in which the certificate was issued. The section has no application until the decision-making process in the original certification proceeding has come to an end. And the event which "marks the end of that proceeding * * *" is when the certificate is "finally granted and the time fixed for rehearing it has passed * * *." *United States v. Seatrain Lines*, 329 U.S. 424, 432. Section 401(f), like Section 401(g), implicitly assumes that the proceeding in which the certificate has been issued has come to an end, and therefore its provision that a certificate "shall continue in effect until suspended or revoked as hereinafter provided" does not preclude the Board from acting upon a timely petition for reconsideration where it permits the certificate to become effective pending rehearing.

² On January 1, 1959, Delta had inaugurated a local flight including service between Chicago and Indianapolis, one of the ten pairs of cities to which the Lake Central and Piedmont petitions for reconsideration had been directed (R. 101).

Both in the civil aeronautics field and in numerous related areas, the courts have concluded that the decision-making process remains alive while a timely petition for reconsideration is pending and that therefore the administrative agency retains authority to change its initial order during that period. Accordingly, the Board's power was not cut off by permitting respondent's certificate to become effective while timely petitions for reconsideration were pending in order to allow needed services to be provided immediately.

An operation which is permitted to go forward while petitions for reconsideration of the grant are pending may be deemed temporary or conditional, i.e., subject to defeasance to the extent that elements of the grant are involved in the rehearing procedures. It is immaterial that Delta did not apply for temporary authority as such, since it proceeded with full knowledge that the certification was not in all respects final. We stress that Delta resisted a stay of the effective date of the certificate so that it might earn revenues during the pendency of the applications for reconsideration and that the Board gave explicit notice that the denial of stay would not foreclose "full and complete consideration of the pending petitions." Respondent "cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the [Board's] approval," *Callanan Road Co. v. United States*, 345 U.S. 507, 513.

As a result of the decision below, as the court of appeals acknowledges, "the Board's dilemma is real."

(R. 106.) The Board either must make unduly hasty decisions on requests for reconsideration raising complex problems or it must postpone the effective dates of certificates—a course which deprives the public of needed services and the carrier of revenues. The cases upon which the court below relied are clearly inapposite since all of them related to the question whether an agency may reopen a closed proceeding and modify an outstanding certificate long after disposition of any petition for reconsideration which may have been filed. Those cases, in short, were within the class to which the provisions of Section 401(g) clearly apply. They cast no doubt upon the distinction between a case in which a modification is sought after the administrative process has been completed and one in which the grant is still the subject of consideration in the initial proceeding as the result of a timely and proper invocation of ordinary rehearing procedures.

ARGUMENT

THE BOARD'S AUTHORITY TO ACT ON TIMELY PETITIONS FOR RECONSIDERATION OF AN ORDER GRANTING A CERTIFICATE IS NOT TERMINATED BECAUSE IT PERMITS THE CERTIFICATE TO BECOME EFFECTIVE WHILE THE PETITIONS ARE PENDING

The court below held that, once the Delta certificate had been allowed to become effective, the Board lost power to act upon pending petitions for reconsideration of the basic Board order granting the certificate. This conclusion was not based on any determination that the result was compelled either as a matter of

due process or fairness to Delta. Indeed, the court assumed that Delta was adequately put on notice, as of the time the Board made the certificate effective, that this action was without prejudice to any action which might subsequently be taken on the pending petitions. Nor did the court believe that its holding was essential, or even advantageous, to the proper performance of the Board's functions; on the contrary, it frankly acknowledged that the "dilemma" in which its decision placed the Board was "real" (R. 106). The court's rationale is that the result is dictated by Section 401(f) of the Federal Aviation Act, 49 U.S.C. 1371(f), which states that "[e]ach certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided * * *." This language it construed to mean that no effective certificate could be changed in any manner, except after further notice and hearing in accordance with the provisions of Section 401(g) of the Act, 49 U.S.C. 1371(g).

We shall urge that this restrictive interpretation is not required by the statute or by the relevant decisions. In our view, a Board order remains subject to modification or rescission in response to a timely petition for reconsideration, without regard to whether the Board has authorized the commencement of operations. This is so, we believe, because the provisions of the Act requiring the institution of formal new proceedings to amend or modify certificates may reasonably be read as applicable to closed proceedings

rather than to the situation presented here, where rehearing procedures had not been completed.

A. We note, at the outset, that no question has been raised as to the Board's authority to adopt Section 302.37 of its Rules of Practice (14 C.F.R. 302.37 (1956 Rev. ed.))⁷ governing reconsideration. Although the Federal Aviation Act, unlike various other federal statutes establishing regulatory commissions, does not expressly provide for reconsideration of Board orders, "[t]he power to reconsider is inherent in the power to decide." *Albertson v. Federal Communications Commission*, 182 F. 2d 397, 399 (C.A.D.C.). The Board's power also derives from Sections 204(a), 1001, and 1005(d) of the Federal Aviation Act, 49 U.S.C. 1324(a), 1481 and 1485(d).⁸ See *American Trucking Assns. v. Frisco Co.*, 358 U.S. 133, 145.⁹

⁷ By a recent revision of the rules, the time within which a petition for reconsideration in a certification ("economic") proceeding may be filed, without special order of the Board, has been reduced from thirty to twenty days. See 14 C.F.R. 302.37 (1960 Supp.).

⁸ Section 204(a) empowers the Board to "perform such acts, * * * and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions" thereof. Section 1001 authorizes the Board "subject to the provisions of this Act and the Administrative Procedure Act", to conduct its proceedings "in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Section 1005(d) provides that "[e]xcept as otherwise provided in this Act, * * * the Board is empowered to suspend or modify [its] orders upon such notice and in such manner as [it] shall deem proper."

⁹ The provisions of Section 1006(e) of the Act, 49 U.S.C. 1486(e), precluding judicial review of any objection to a

Nor is it contended that the Board rule governing reconsideration, providing for the filing of a petition within thirty days of the issuance of the order (a period well within the sixty days upon which certificates are ordinarily made effective), was in any respect improper. The question is solely whether Section 401(f) of the Act precludes the Board from acting on such a petition if it has not done so before the effective date specified in the certificate.

The court of appeals believed that Section 401(f) has this limiting consequence because it provides that a certificate, once effective, is to "continue in effect until suspended or revoked as hereinafter provided * * *." The defect of this view is that it ignores the fact that Section 401(f), in setting out the circumstances under which an effective certificate may be altered¹⁰ or terminated, obviously contem-

Board order not first "urged before the Board" would appear to require a petition for reconsideration as a prerequisite to obtaining court review of matters not fairly in issue during the agency proceeding. Compare *Livers v. Anderson*, 326 U.S. 219, with *Peoria Braumeister Co. v. Yellowley*, 123 F. 2d 637 (C.A. 7).

¹⁰ It should be noted that Section 401(f) does not, in terms, purport to govern the specific situation presented by this case of a minor amendment to a much more comprehensive certificate. It provides only that a certificate "shall continue in effect" until suspended or revoked "as hereinafter provided" (or until the Board certifies that operations have ceased). Nothing is said about the terms of operation under the certificate, and specifically there is no reference to the Board's authority to alter, amend or modify the certificate once it becomes effective. Thus, even if the court of appeals' interpretation of the section was otherwise correct, it need not be read as if it provided that a certificate shall "continue in effect *without change* until *altered, amended, modified*, suspended or revoked as hereinafter provided."

plates the situation which prevails after the underlying Board proceeding has been finally concluded. The question when the Board's decision becomes final is not answered simply by referring to the date that the carrier is permitted to commence operations. Thus, it is clear that a certificate, effective in the sense that carrier operation thereunder would be legal, would nonetheless be terminated, without going through the procedures specified in Section 401(g) of the Act, if the Board order making the award were set aside upon judicial review. The situation is essentially the same with respect to reconsideration pursuant to a valid Board rule. See *Federal Communications Commission v. National Broadcasting Co.*, 319 U.S. 239, 245.

This is not to say that the Board has unlimited powers to keep a proceeding alive through the exercise of its rule-making authority, or that Section 401(f) of the Act is without function beyond specifying the date on which a certificate first becomes effective. Obviously, the Board has a duty to dispose of petitions for reconsideration within a reasonable time. Also, Section 401(f) may well preclude entertaining an out-of-time petition for reconsideration filed after a certificate has gone into effect. For present purposes, it suffices to say that when a certificate becomes effective at a time when one or more valid petitions for reconsideration are already pending, it does no violence to the letter or spirit ¹¹ of Section 401(f) to

¹¹ It would appear that Delta received, in substance, all of the protection afforded by Section 401(g), even assuming the court of appeals' view of the law to be correct. For "notice"

recognize that the certificate is subject to defeasance in whole or part should the petition for reconsideration be granted. We submit that, at the least, this should be the rule where, as here, the Board, in permitting the certificate to become operative, has expressly conditioned its approval upon the outcome of the pending petitions for reconsideration.

The question whether Section 401(g) should be read as applicable only to certificate changes which take place after the initial licensing proceeding has been fully completed must be resolved, as indicated above, by a consideration of the logic and sense of the statute. In this process, one must give weight to the presumption that Congress was fully aware of the normal incidents of the administrative process, including the precept that the power to decide includes the power to reconsider. Legislative history, however, is of little aid in this case. There was no specific reference to the question now before the Court when Congress considered the Federal Aviation Act of 1958, the predecessor Civil Aeronautics Act of 1938, or the Motor Carrier Act of 1935, on which the Civil Aeronautics Act was patterned. However, this

of the proposed modification of the certificate was provided by the petitions for reconsideration, as well as by the Board's express reservation, in its order denying a stay, of its "power to modify the certificate on the basis of the matters set forth in the filed petitions for reconsideration" (R. 106). And any "hearings" relevant to the issue had already been had since reconsideration was sought on the basis of the record already made (R. 88-93). Thus, even if the Board action on reconsideration were deemed a modification requiring proceedings in compliance with Section 401(g), there was compliance with the requirements of that section in everything but name.

much may be said. Sections 401 (g) and (h) of the Civil Aeronautics Act (which are identical to Sections 401 (f) and (g) of the Federal Aviation Act) were modeled after Section 212(a) of the Motor Carrier Act of 1935, 49 Stat. 555.¹² Section 212(a) of the latter statute was certainly not designed to preclude the modification of an effective certificate in response to a timely petition for reconsideration. Indeed, the original Motor Carrier Act, having provided in Section 212(a) that certificates shall be "effective from the date specified therein" and "remain in effect until terminated as herein provided," contained another provision (Section 204(e), 49 Stat. 547) which declared that the Commission may reconsider any "decision, order, or requirement," that an application for reconsideration shall not constitute a stay of the Commission's action, and that on rehearing the Commission might reverse, change, or modify its "original decision, order, or requirement." Thus, there was no question that the Interstate Commerce Commission was empowered to modify an effective certificate award in response to a timely petition for reconsideration. See *Denver-Chicago Trucking Co. Common Carrier Application*, 27 M.C.C. 343, 345.¹³ There is no

¹² It appears clearly that Section 401 (g) and (h) of the Civil Aeronautics Act were taken directly from Section 212(a) of the Motor Carrier Act of 1935. See Confidential Committee Print, May 1, 1937, on S. 2, 75th Cong., 1st Sess., pp. 42-43.

¹³ Although the Civil Aeronautics Act did not have special statutory provisions dealing with applications for reconsideration, it is scarcely to be doubted that the power to reconsider is inherent and does not require specific authorization. See *supra*, p. 13.

indication that Congress, in enacting the Civil Aeronautics Act or any other licensing statute, has proposed to do otherwise.

B. The case law which bears on the subject is completely consistent with the view that procedures of the kind prescribed in Section 401(g) of the Act were not intended to come into play until the "certificate [has been] finally granted and the time fixed for rehearing it has passed." *United States v. Seatrain Lines*, 329 U.S. 424, 432. The precise question appears to have been raised in only one previous case involving the Board, *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C.). There, a contention was made that the Board's order on reconsideration, which included an amendment to an effective award, was "a nullity because it was rendered * * * after the certificate previously issued had become effective" (*id.* at 810). But the court of appeals rejected the argument without discussion. In *Western Airlines, Inc. v. Civil Aeronautics Board*, 194 F. 2d 211, 214 (C.A. 9), a similar result was reached where the problem was whether the Board could impose conditions upon a certificate transfer, in response to a timely petition for reconsideration, notwithstanding the fact that the transfer had already become effective.¹⁴

¹⁴ The Board has previously modified, upon reconsideration, certificates which it had allowed to become effective. See *e.g.*, *North Central Case*, 8 C.A.B. 208 (1947); *Cincinnati-New York Additional Service*, 8 C.A.B. 603 (1947); *United-Western, Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950); *Service to Phoenix Case*, Order E-12039 (1957); *South Central Area Local Service Case*, Order E-14219 (1959). The

In a number of cases, a question has been raised as to whether the time for filing an appeal runs from the Board's original order or its order on reconsideration. In these instances, the courts of appeals have recognized that the order on reconsideration is but another step in the decision-making process in the original proceeding and that until that order is entered the Board has the continuing power to modify its original order. *Outland v. Civil Aeronautics Board*, 284 F. 2d 224, 226-228 (C.A.D.C.); *Waterman Steamship Corp. v. Civil Aeronautics Board*, 159 F. 2d 828, 829 (C.A. 5), reversed on other grounds, 333 U.S. 103; *Braniff Airways v. Civil Aeronautics Board*, 147 F. 2d 152, 153 (C.A.D.C.) But cf. *Consolidated Flowers Shipments v. Civil Aeronautics Board*, 205 F. 2d 449 (C.A. 9). "Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied" because, as the court stated in the *Outland* case, "there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary" (284 F. 2d at 227). In the *Waterman* decision, the filing of a "grave doubt as to its statutory power to do so" (R. 105) said to have been expressed by the Board in *Kansas City-Memphis-Florida Case*, 9 C.A.B. 401, was a doubt shared by only three members of the Board and did not serve as the basis for their decision, since the initial award was affirmed on its merits. Moreover, the question was as to the power to revoke, not the power to add restrictions of the kind here involved, a distinction which might have been considered significant in view of the different standards which have to be met for revocation, as contrasted with amendment, under Section 401(g). In later cases, as noted above, the Board has ordered modifications.

petition for reconsideration was held to have "operated to retain the Board's authority over the order" (159 F. 2d at 829).¹⁵

The courts have reached similar decisions in the communications field in which, as here, there are statutory provisions¹⁶ requiring a new hearing preliminary to revocation or modification of license. *Black River Valley Broadcasts v. McNinch*, 101 F. 2d 235 (C.A.D.C.); *Albertson v. Federal Communications Commission*, 182 F. 2d 397, 399 (C.A.D.C.); *Enterprise Company v. Federal Communications Commission*, 231 F. 2d 708 (C.A.D.C.), certiorari denied, *sub nom. Beaumont Broadcasting Corp. v. Enterprise Company et al.*, 351 U.S. 920; *W. S. Butterfield Theatres v. Federal Communications Commission*, 237 F. 2d 552 (C.A.D.C.). In the *Black River* case, the court held that a radio construction permit could be withdrawn upon reconsideration of the application, notwithstanding the fact that the licensee had virtually completed construction following the effective date of the permit. This was held to be so because, until the agency acted on the petition for rehearing, "there was no final grant of a permit or license to plaintiff [and]

¹⁵ The decision below would create a problem with respect to judicial review of Board orders. For, if the effectiveness of the certificate controls whether the Board can act on a petition for reconsideration, a party to a Board proceeding wishing to seek court review of the order will either have to forego a petition for reconsideration altogether (but see note 9, *supra*, p. 13), or, with the approach of either the date upon which the certificate would normally become effective or the date by which a petition for review of the original Board order would have to be filed, will be required to file a "protective" review petition to avoid the possibility of losing its appeal rights.

¹⁶ See 47 U.S.C. 312, 316.

it went forward with its project at its peril". (101 F. 2d at 242; emphasis added.)¹⁷

The Interstate Commerce Commission cases relied on by the court of appeals—*United States v. Seatrain Lines*, 329 U.S. 424; *United States v. Watson Bros. Transportation Co.*, 350 U.S. 927, affirming 132 F. Supp. 905 (D. Neb.); *American Trucking Assns. v. Frisco Co.*, 358 U.S. 133, and *Smith Bros., Revocation of Certificate*, 33 M.C.C. 465—are nowise inconsistent with our view of the statutory scheme. All of these cases relate to the question whether an administrative agency may reopen a closed proceeding to modify or revoke an outstanding certificate long after disposition of any petition for reconsideration that may have been filed. In the *Seatrain* case, for example, the Commission sought to modify a certificate a year and a half after the certificate had been finally granted and the time fixed for rehearing had passed. In the *Watson* case, the period was four years after the proceeding had terminated. These were cases which involved "the reopening" of a closed proceeding. *American Trucking Assns. v. Frisco Co.*, *supra*, 358 U.S. at 146. If anything, these decisions lend some support to the position which we urge here, for they indicate that even in such circumstances there are occasions when a new proceeding is not required. See, e.g., *American Trucking Assns. v. Frisco*, *supra* (correction of inadvertent ministerial errors).¹⁸

¹⁷ See, also, *Fuller-Topance Truck Co. v. Public Service Commission*, 96 P. 2d 722, 724-725 (S. Ct. Utah); *Hazard-Hyden Bus Co. v. Black*, 293 Ky. 379 (Ct. App.), 169 S.W. 2d 21.

¹⁸ The *Smith Bros.* case, *supra*, was also one in which the certificate had long been in effect; the question was whether

C. The fact that the Board ordinarily is able to dispose of petitions for reconsideration before the effective date of a certificate, as the court below noted (R. 105-106), is scarcely an indication of a lack of power to modify a certificate on reconsideration where it has been unable to resolve the question before that date. Nor does it suffice to say, as does Delta, that the decision below need not result in unduly hasty decisions since "the [Board] can always write a longer grace period * * * into a new certificate when it is granted" or, if the period proves to be inadequate, "all the Board has to do * * * is to extend the effective date of new certificates until it finishes its job of reconsideration" (Br. in Op. 22). This procedure may be useful in some circumstances. But it is not an answer where, as in the situation faced by the Board in this case, there is a pressing need for the inauguration of the newly authorized services. Had the Board postponed the effective dates of the certificates until May 7, 1959, when the reconsideration requests were decided, the peak Florida winter season travel would have been lost to the three newly certificated carriers (including Delta) whose direct Detroit-Florida grant was in no way affected by the later reconsideration.¹⁹

such certificate could be revoked by the device of a self-executing forfeiture provision contained in the certificate.

¹⁹ The fact that the Board did extend the effective date of Eastern's certificate (Br. in Op. 23) is of no help to Delta if for no other reason than that one ground for the Board's action was the inability of Eastern (because of a strike) to inaugurate service (R. 78).

Having been permitted to inaugurate the newly authorized service in time for the peak winter traffic and having itself *resisted* efforts by others to defer the start of this service (see *Eastern Air Lines v. Civil Aeronautics Board*, 261 F. 2d 830 (C.A. 2)), Delta is scarcely in a position to argue now that an additional delay to permit reconsideration would not have been "crucial" (Br. in Op. 23). Moreover, it is the responsibility of the Board to pass judgment upon the need for immediate service.

Nor is there merit to Delta's contention that the Board "can stay only a portion of a new award, if it desires to put uncontested portions into effect while giving more thought to those parts concerning which reconsideration has been sought." (*Ibid.*) For, apart from the practical administrative problems such a procedure would entail in a complex proceeding like the instant one, there are frequently no portions of an award which are uncontested. And even where some parts of an order are not challenged on reconsideration, the Board may well conclude that contested portions should be permitted to become effective pending resolution of reconsideration requests which, on a preliminary examination, do not appear likely to be granted.

As a matter of fact, Delta itself has recognized that a new proceeding is not always required to modify an effective certificate. (Delta's Reply to Reply of Petitioner in No. 493, dated December 1, 1960, pp. 3-5.) Delta acknowledges that, in connection with its own petition for reconsideration, it urged that its certificate could be modified, notwithstanding the fact

that it had already become effective. Its explanation for this apparent inconsistency is that its petition requested the Board to *add* authority (through the removal of a restriction), whereas the Board sought to withdraw authority (through the imposition of a restriction). No such distinction, however, can be justified either by any policy considerations of which we are aware or by the language of Section 401(g) which, when applicable, requires a new proceeding, to "alter, amend, modify, or suspend any such certificate * * *," regardless of the nature of the modification.²⁰

Recognizing the dilemma which its decision created for the Board, the court below suggested (R. 106, n. 12) that the Board might, for the future, "investigate the possibility of issuing some form of temporary authorization." But temporary authorization was in substance all that Delta received at the time its certificate became effective, since it was expressly made subject to such changes as a "full and complete consideration of the pending petitions for reconsideration" might warrant (R. 80). Perhaps the court of appeals was reluctant to view the matter in this light because it thought that the temporary certificates expressly provided for by Section 401(d) of the Act, 49 U.S.C. 1371(d), can only be granted upon "application"

²⁰ That section reads as follows:

(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public

therefor.²⁰ But this is not an obstacle. Taking into account (a) that Delta opposed a stay of authorization as sought by the applicants for reconsideration and (b) that it proceeded to operate with full notice that the Board, which had not yet completed the proceeding, proposed to do so, we submit that it must be taken to have acquiesced in the conditions which were implicitly attached to the Board's approval. See *Callanan Road Co. v. United States*, 345 U.S. 507, holding that a transferee of a water carrier permit, having invoked the power of the Interstate Commerce Commission to approve the transfer of an amended permit to it, could not thereafter challenge the procedures by which the Commission had amended the permit while it was in the transferor's hands. Cf. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 435, holding that the Interstate Commerce Commission, in approving the acquisition of two motor carriers by a railroad affiliate, could reserve the power to impose future limitations upon the certificates in order to insure that the activities of the new subsidiaries would remain auxiliary and supplemental to rail operations, without offending a statutory pro-

convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

vision stating that a certificate shall remain in effect until suspended or terminated.

Since the court of appeals refused to consider the authorization in this case as one inherently limited, albeit Delta was unmistakably aware of the Board's declared purpose to reserve final decision on the matters presented for its reconsideration, it is difficult to see how the court's invitation to consider other possibilities leaves the Board any appreciable room for improvisation. The only satisfactory answer to the practical problem, we believe, is that the Board, like similar agencies performing licensing functions, should be deemed empowered to adopt and implement ordinary rehearing procedures. If Section 401(g) is viewed, as we think it should be, as a provision addressed only to modifications, suspensions and revocations *subsequent* to the completion of the initial licensing proceeding, the Board will be able to proceed in customary and orderly fashion.

CONCLUSION

The judgment below should be reversed and the cause remanded with instructions to dismiss the petition for review.

Respectfully submitted.

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On Writ of Certiorari to the United States Court of
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BRIEF FOR DELTA AIR LINES, INC.

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BRIEF FOR DELTA AIR LINES, INC.

Delta Air Lines, Inc. (hereinafter "Delta"), the Petitioner below, prays that this Court will affirm the decision of the United States Court of Appeals for the Second Circuit in *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 280 F. 2d 43 (2d Cir. 1960) (R. 98-107).

COUNTERSTATEMENT OF QUESTION

Whether the Civil Aeronautics Board (hereinafter the "CAB"), after it has deliberately made a certificate of public convenience and necessity effective under Section 401(f)¹ of the Federal Aviation Act,² wherein it is provided that a certificate shall be effective "from the date specified therein and shall continue in effect until suspended or revoked as" thereafter in the statute provided, still has power to alter such a certificate by acting on timely petitions for reconsideration of the underlying agency decision but without resort to the procedures specifically provided in the statute for certificate modification.³

COUNTERSTATEMENT OF THE CASE

Contrary to the implication contained at page 5 of the CAB's Brief, the agency proceeding here involved did not concern only "the long-haul service needs" of the Great Lakes-Florida area. There was no limitation placed upon the trial of Delta's application, or upon that of any other trunkline applicant, which in any way limited the applicants' rights to seek both long-haul authority and also

¹ 72 Stat. 754, 49 U.S.C. 1371(f).

² 72 Stat. 731, 49 U.S.C. 1301. Between issuance of the CAB's September 30, 1958, decision, and the attempted modification of Delta's certificate on "reconsideration," the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401) was replaced by the Federal Aviation Act of 1958. The provisions of the former Act here involved were reenacted without change, and there admittedly is no issue stemming from the supplantation of the former Act.

³ In essence, the Question as stated above is the same as that set forth in the CAB's Brief (No. 492). It is different, however, than that set forth in the Brief of Lake Central Airlines, Inc., in No. 493, because the latter involves an allegation that the CAB had "expressly reserved" the right to make the certificate modification of which complaint here is made. As hereinafter will be shown, however, there was no express reservation of right, and no such allegation was contained in the Question presented to this Court in Lake Central's Petition for Certiorari.

authority to provide short-haul types of service between intermediate cities in the area (the latter being the type of authority which, as deliberately granted to Delta, forms the basis of the present controversy). See CAB Order E-9734, R. 2 *et seq.*

In its decision of September 30, 1958 (CAB Order E-13024, R. 11 *et seq.*), the CAB added a number of cities to Delta's Route 54, one of which was Indianapolis, Indiana. Prior to that time, Route 54 had run in a southeasterly direction from Chicago to Miami via certain intermediate points not including Indianapolis. Indianapolis, however, was already served by Delta on another route (Route 8) which ran in a southwesterly direction from Detroit to New Orleans via intermediate points, including Evansville, Ind., as well as Indianapolis. The addition of Indianapolis to Route 54 permitted Delta for the first time to offer service between that city and other nearby points already served by Route 54 (*e.g.*, Cincinnati).⁴ Since Indianapolis already was an intermediate point on the Detroit-New Orleans Route 8, inclusion of that city as an intermediate point on Route 54 had the additional effect, which the CAB specifically recognized and approved (R. 19 and 38) of joining the two routes together at Indianapolis, thereby permitting Delta to serve cities on both of these routes on the same flight, provided that the flight stopped at the "route junction point" of Indianapolis.⁵

⁴ This was also true of the addition of two other cities to Route 54, Dayton and Louisville. The addition of the latter two cities, plus Indianapolis, permitted Delta to serve 10 markets formed by those three cities, on the one hand, and nearby, already-certificated points, on the other hand. All 10 of these markets are involved in the present controversy, the Indianapolis markets cited in the text being used only as illustrative examples.

⁵ Unless the CAB imposes "restrictions," a carrier may operate flights between any combination of authorized points on a given linear route. Similarly, absent restrictions, when two routes of a carrier have a common point, the carrier may operate flights between any combination of points on the two routes via the common point.

For example, after inclusion of Indianapolis on Route 54, Delta could operate from Chicago to Indianapolis over that route, and thence on the same flight from Indianapolis to Evansville over existing Route 8.

As the Brief (p. 5) of Lake Central Airlines, Inc. in No. 493 (hereinafter "Lake Central") notes, the agency imposed restrictions on a number of new certifications granted to *other* applicants in order to protect existing local service carrier operations. Contrary to the statement at page 6 of the CAB Brief, however (where the agency implies that "such restrictions" were imposed with respect to some of Delta's new intermediate points), *none* of these restrictions were imposed upon the certifications made to Delta.⁶ Indeed, no restrictions of any kind were imposed upon Delta's new Louisville and Indianapolis authorities.

The new Delta certificate was to become effective sixty days after issuance (i.e., on November 29, 1958), with the proviso that *prior* thereto the CAB might extend that effective date upon its own initiative or in recognition of a timely-filed petition for reconsideration of the September 30th order (R. 56). As CAB and Lake Central have stated, petitions for reconsideration were in fact filed by various parties including Lake Central and Piedmont Aviation, Inc. (hereinafter "Piedmont"), both local service carrier intervenors in the agency proceeding. These two petitions sought, *inter alia*, to have restrictions imposed upon Delta's authority between ten pairs of cities which Delta had been certificated to serve without restriction by the September 30th decision.⁷

⁶ The few restrictions which were imposed upon Delta's new authority (R. 46-47), were all imposed for other reasons.

⁷ It might be noted that Piedmont, which is affected equally as much as Lake Central by the Decision below, did not attempt to intervene in the Court proceeding.

Lake Central's petition to the CAB for reconsideration also requested a stay of the effective date of Delta's certificate if necessary to permit CAB action on the petition to be taken before the certificate went into effect (R. 92). On November 28, 1958, the CAB issued its Order E-13211 (R. 57 *et seq.*) which, with one exception, refused to stay the effective date of any new certificate and therefore specifically denied Lake Central's plea (R. 58 and 80).

The CAB assigned two interrelated reasons for its refusal to grant the requested stays. First, after reviewing the various petitions for reconsideration "for the purposes of assessing the probability of error in [the CAB's] original decision" (R. 58 and 79-80), the agency found that they did not make a sufficient showing of probable legal error or abuse of discretion to justify a stay, except for the one exception referred to above (R. 58-59). Second, the CAB stated that it wished to have the new services involving Florida inaugurated in time for the peak period of winter travel during the 1958-1959 season (*ibid.*). As Petitioners' Briefs note, the CAB's opinion closed with the statement that Order E-13211 was not a disposition of the several petitions for reconsideration on their merits, which disposition would be made at a later time (R. 79-80; also see R-58).

The one exception where a stay was granted involved new authority which had been awarded to Eastern Air Lines, Inc. Piedmont, in its petition for reconsideration, sought revisions of an extension which had been made of Eastern's Route 6 from Charleston, W. Va., to Chicago. In its opinion accompanying Order E-13211, the CAB found that Piedmont's objections to this Eastern authorization *did* raise serious questions (no such finding was made with respect to the petitions directed to the Delta certificate); and it was for that reason that the Eastern certificate's effective date was stayed until further action could be taken by the CAB (R. 78). At the same time,

while it stayed the entirety of Eastern's Charleston-Chicago certification, the CAB invited Eastern to show how the certificate might be stayed only in part to protect Piedmont during the reconsideration process, while being allowed to go into effect in other respects (R. 78-79).

For reasons not here relevant, by supplementary CAB order Delta's new certificate actually was made effective on December 5, 1958, rather than November 29, 1958 (see R. 94 and 95). On January 1, 1959, pursuant to schedules filed with the CAB—to which schedules no party, including the CAB and Lake Central, lodged any objection—Delta inaugurated various services under the new certificate, including flights between Chicago and Indianapolis which continued beyond Indianapolis southward to Evansville over Delta's long-established Route 8. Shortly thereafter, Delta also inaugurated service between Louisville and Indianapolis. In both instances, the services inaugurated would not have been permitted had the Board imposed the type of restrictions which Lake Central and Piedmont had requested during the course of the administrative proceeding.

On May 7, 1959, over five months after Delta's new, unrestricted authority became fully effective, and four months after Delta had inaugurated new services pursuant to the schedules filed with the CAB, the agency issued the order of which complaint was made in the Court below (E-13835, R. 81 *et seq.*). This order purported to constitute the CAB's formal disposition of the various petitions for reconsideration of the September 30, 1958 decision which the CAB by its own choice had left pending when it deliberately made the certificate effective. The order did in fact undertake to modify the former decision, by imposing upon Delta the restrictions which Lake Central and Piedmont had requested, but which had been omitted from the certificate as originally issued, so that a Delta flight serving any one of the ten pairs of cities

mentioned in those carriers' petitions would thereafter be required to originate at Atlanta or a point on Route 54 south thereof (R. 83-84). Although the CAB indicated that it could review the matter of Delta's restrictions in a then-pending *Great Lakes Local Service Investigation*, CAB Docket 4251 *et al.* (R. 83-84), that *Investigation* has now been completed and no further action has been taken on the Delta restrictions.

One effect of the restrictions was to render illegal the services which Delta already had inaugurated in good faith, and had been operating for some four months, between Evansville and Chicago via Indianapolis, and for a shorter period between Indianapolis and Louisville. The former of these two services was the very type of inter-route operation which the CAB, in its original decision, had noted could be provided by Delta by virtue of the inclusion of Indianapolis on Route 54 in addition to its already-existing status as a point on Delta's Route 8 (R. 19 and 38). And as the Court below found, "it is affirmatively clear that when the Board refused on November 28, 1958 to stay the effective date of Delta's certificate, it was fully aware of the arguments which subsequently led it on May 7, 1959, to impose the restrictions here complained of" (R. 104).

Upon Petition by Delta, the Court below stayed the effectiveness of Order E-13835 and, in its later decision (R. 98 *et seq.*), held that the CAB was without power to impose the additional restrictions upon Delta's certificate by means of "reconsideration" after the certificate had become effective. The decision was based upon the limitations imposed by Congress upon the CAB in Sections 401(f)^a and 401(g)^b of the Federal Aviation Act.

^a 72 Stat. 754, 49 U.S.C. 1371(f).

^b 72 Stat. 754, 49 U.S.C. 1371(g).

SUMMARY OF ARGUMENT

In Section 401(f) of the Federal Aviation Act, Congress has declared with preciseness that an air carrier certificate of public convenience and necessity "shall be effective from the date specified therein," and shall "continue in effect until suspended or revoked" as thereafter provided in the statute. Section 401(g) of the Act is the only provision (other than sections providing for judicial review) which deals with modification of effective certificates. Section 401(g) sets forth definite procedures by way of notice and hearing and clear standards which must be employed before such modifications can be accomplished.

All parties agree that Delta's certificate here became effective before the CAB attempted to modify it, and all parties agree that the prescribed Section 401(g) procedures were not followed by the agency in attempting the modification. It also is admitted that there was no fraud, no misrepresentation, and no clerical or other inadvertent error in the original issuance of Delta's certificate or in the agency's action, many months before the attempted modification, in making that certificate effective under Section 401(f). Nor was there any express reservation in the CAB's orders or in Delta's certificate of a right to reconsider the certificate later.

Indeed, it is affirmatively clear that when the CAB refused to stay the effective date of Delta's certificate just prior to that effective date, the agency was fully aware of the arguments which subsequently led it to attempt the imposition of the restrictions. It was as fully aware of those arguments as it was of the arguments which *did* prompt it to stay the effective date of an Eastern Air Lines certification on the ground that the petitions for reconsideration had shown good reason for revision of the Eastern award. The subsequent imposition of restrictions

on Delta, therefore, was attempted merely because of a post-decisional change of policy by the agency.

The CAB contends for purposes of this case that there is an "implicit" exception to the requirements of Section 401(f) which allows modification of a certificate without adherence to Section 401(g) procedures where, on the effective date of a certificate, the agency of its own choice has not acted upon pending petitions for reconsideration but nevertheless has proceeded to make the certificate fully effective. But there is nothing in the statute or in its legislative history to support such an implicit exception. Indeed, contrary to most federal statutes creating regulatory agencies, the Federal Aviation Act does not specifically confer on the agency any right to reconsider even its "orders." While the agency undoubtedly does have the right to provide by rule-making for reconsideration of "orders," prior decisions of this Court establish that the agency cannot circumvent the clear statutory requirements by also providing for reconsideration of fully effective "certificates," because to do so would derogate from and conflict with explicit statutory provisions to the contrary. Approval of such a procedure would render the carefully designed statutory scheme a shambles, and would destroy the route security supposed to be provided by certificates—the very keystone of the Federal Aviation Act.

The decision below accords fully with a long line of judicial and administrative precedent, and there is no conflict between the decision below and that of any other Circuit on the substantive issue—the only issue here involved—of the proper effect of Sections 401(f) and 401(g) of the Act. The decision under review is entirely in line with decisions by this Court holding that under a statutory framework such as that prescribed in the Federal Aviation Act, effective certificates of public convenience and necessity can be modified only in the manner spe-

cifically authorized by Congress. Indeed, the decision below is in line with a large number of previous opinions by the CAB itself, issued over an extended period of years, wherein the agency as a matter of consistent practice has recognized its lack of power to reconsider effective certificates. Moreover, since its attempt in this case (on May 7, 1959) to "reconsider" Delta's effective certificate, the agency has returned to its former practice. The agency's action here under review constitutes an arbitrary departure from its own past (and present) policy for the mere purpose of attempting to enforce a post-decisional change of policy in this particular case.

The decision below will not impede the administrative process, or even render difficult the agency's reconsideration of route case decisions. Prior to the decision below, the CAB itself has recognized that the "implicit" exception to Section 401(f) for which it now contends does not exist, yet the agency has had no difficulty in adopting procedures which have allowed it full freedom to reconsider its decisions. In fact, the CAB has at least four courses of action open to it, each one of which is in full accord with the law as laid down by Congress, each one of which allows the agency complete freedom of action, and no one of which is foreclosed by the decision here under review. On the other hand, approval of the position urged by Petitioners would destroy a carefully-designed statutory scheme which now affords full protection to both public and private interests, and would render implementation of new route certifications an exceedingly precarious undertaking.

ARGUMENT

Both the CAB and Lake Central contend that the decision below gives an unduly restrictive interpretation to Sections 401(f) and 401(g) of the Federal Aviation Act, which is not required (a) by the language of the statute

or (b) by the relevant case law. In addition, the CAB argues that the decision below will hamper its administrative processes. Delta will show that none of these three arguments contains any substance.

I. The Decision Below Properly Construed and Applied the Language of the Federal Aviation Act.

When reduced to its essence, the decision below is merely this: Because the CAB is a creature of Congress, its "powers are purely statutory," *Seatrain Lines, Inc. v. United States*,¹⁰ and it therefore can act only "... as specifically authorized by Congress," *United States v. Seatrain Lines*.¹¹ As the Court below recognized (R. 103), the *Seatrain* case involved a situation analogous to the one involved here. The decision below, therefore, merely applied well-settled law to the clear and unambiguous language of Sections 401(f) and 401(g) of the Federal Aviation Act. It rejects, as did *Seatrain*, an agency attempt to read into its organic statute a power which Congress chose not to grant—a power which, however, would create an implied exception to a clear limitation which Congress did impose.

The Congressionally imposed limitation is upon the CAB's power to modify certificates once they have been made effective, and is contained in the following portion of Section 401(f):

"Each certificate shall be effective *from the date specified therein*, and shall continue in effect until suspended or revoked as *hereinafter* provided . . ."
(Emphasis added.)

And as the Court below held (R. 103), the next succeeding section, Section 401(g), is the *only* provision in the

¹⁰ 64 F. Supp. 156, 160 (D.C. Del. 1946), *aff'd.*, *United States v. Seatrain Lines*, 329 U.S. 424 (1947):

¹¹ 329 U.S. 424, *supra*, at 433.

Act which expressly deals with agency modification of certificates.¹² Section 401(g), which prescribes specific procedures for effecting such modification, admittedly was not followed here.

The Petitioners argue that Sections 401(f) and 401(g) must be read as "contemplating" or "implicitly assuming" (CAB Brief, pp. 9 and 14-15) an exception¹³ which would allow modification of an effective certificate without adherence to Section 401(g) procedures in those instances where, on the date specified by the CAB in a certificate for its effectiveness under Section 401(f), the agency through its own choice leaves pending a previously filed petition for reconsideration of the underlying agency decision.¹⁴

¹² Section 1006(d) of the Act, of course, 72 Stat. 795, 49 U.S.C. 1486(d), provides for judicial review of CAB decisions, including those granting certificates. See pages 15-16 of this Brief, *infra*.

¹³ Although Section 401(f) does state three express exceptions to its rule of certificate inviolability, none of them is applicable here: (1) a certificate conferring temporary authority ceases to be effective upon expiration of its term (Delta's certificate here was permanent); (2) a certificate will cease to be effective if the CAB certifies that operations under it have ceased (there has been no such certification here); and (3) if a carrier fails to inaugurate service authorized by a certificate within 90 days of authorization, the CAB upon notice and hearing may revoke the unused authority (here Delta did inaugurate service under its new certificate within 90 days and, of course, there has been no notice or hearing of any kind).

¹⁴ The CAB contends that this "implied" exception must be read into the statute because otherwise its reconsideration of CAB route decisions will be rendered difficult (CAB Brief, pp. 10-11). As will be seen below, however (this Brief, pp. 37-43), prior to this case the CAB itself has recognized that the exception for which it contends does not exist, yet the agency has had no difficulty adopting procedures which have allowed it full freedom of action to reconsider its decisions. The decision below leaves all of these procedures open to the agency, and strikes down only the unauthorized procedure sought to be utilized in this particular case.

Neither the CAB nor Lake Central is able to point to any specific language in Section 401(f), Section 401(g), or elsewhere in the statute or in its legislative history, which explicitly or implicitly grants to the agency such a power to alter the words of Congress for purposes of a particular case merely by withholding its decision on a petition for reconsideration. To the contrary, the language of the statute is clear and unambiguous:

" . . . It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that, result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation . . .

" . . . where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. . . ." (*United States v. Missouri Pac. R.R.*, 278 U.S. 269, 277-278, 1929).

Not only can Petitioners cite no support for the "implicit" exception for which they contend, but the Petitioners are unable to point to any specific language in the statute which grants the CAB power to reconsider certificates under any circumstance. The CAB, in fact, admits that ". . . the Federal Aviation Act, *unlike* various other federal statutes establishing regulatory commissions, does *not* expressly provide for reconsideration" even of CAB "orders" (CAB Brief, p. 13, emphasis added.) It therefore relies upon the proposition that the "power to reconsider is inherent in the power to decide," and argues that Sections 204(a), 1001, and 1005(d) of the Act, 49 U.S.C. 1324(a), 1481, and 1485(d), "create" such a power (*ibid.*). Delta does not challenge the CAB's power to adopt procedural regulations setting up a reconsideration

procedure. But Delta does emphasize that procedural rules adopted under these *general* sections of the statute (quoted in the margin),¹⁵ which deal only with "amending," "modifying," or "suspending" CAB "*orders*," cannot be used to modify the *specific* language of Sections 401(f) and 401(g). The latter two sections prescribe when a *certificate* shall become effective and carefully outline the procedure thereafter to be followed in the event that it is desired to consider possible revision of a *certificate*.

In the *Seatrain* case, *supra*, the Interstate Commerce Commission relied upon language in the Water Carrier Act which was substantially identical with Sections 204 (a), 1001, and 1005(d) of the Federal Aviation Act, in attempting to create a power which Congress had not specifically granted to modify certificates. This Court rejected the argument, and held (329 U.S. at 432):

"Nor do we think that the Commission's ruling was justified by the language of Sec. 315(c), 49 USCA Sec. 915(c), 10A FCA title 49, Sec. 915(c), which authorizes it to 'suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.' *That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used*

¹⁵ Section 204(a) merely empowers the CAB "to perform such acts, to issue and amend such *orders*, and to make and amend such general or special rules, regulations, and procedure, pursuant to and *consistent with the provisions of this Act*, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act" (emphasis added). Section 1001 authorizes the CAB, but only "subject to the provisions of this Act and the Administrative Procedure Act," to conduct its proceedings "in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Section 1005(d) only provides that "*except as otherwise provided in this Act*, . . . the Board is empowered to suspend or modify [its] *orders* upon such notice and in such manner as [it] shall deem proper" (Emphasis added).

in the Act. Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word 'order.' Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word 'certificate.' . . . It is clear that the 'orders' referred to in 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. *But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding . . .*" (Emphasis added).

The CAB seeks to support its argument for an "implicit" exception by noting that a certificate would be terminated, "without going through the procedures specified in Section 401(g)," if the Board order making the award were set aside upon judicial review. "The situation," the CAB argues, "is essentially the same with respect to reconsideration pursuant to valid Board rule" (CAB Brief, p. 15). The CAB clearly is wrong. Sections 401(f) and 401(g) are not limitations upon the power of courts to review CAB decisions. The courts specifically are empowered by Congress to set aside agency action which is improperly taken, provided only that a petition for review is timely filed (Section 1006 of the Federal Aviation Act, 72 Stat. 795, amended by 74 Stat. 255, 49 U.S.C. 1486). If, upon review, agency action granting new certificates is found to be improper, the certificates involved become ineffective from the outset and therefore naturally fall "without going through the procedures specified in Sections 401(g)."

Sections 401(f) and 401(g), on the other hand, were written into the statute as specific limitations upon the agency's power. Furthermore, the Court is not here faced with a situation where original CAB action is alleged to

have been taken improperly. To the contrary, both the original grant of new authority to Delta (CAB Order E-13024, R. 11 *et seq.*), and the agency's action in putting that authority into effect (CAB Orders E-13211 and E-13245, R. 57 and 95), were deliberate acts which in no manner contravened the law. The Court rather is faced with an arbitrary administrative change of policy made *after* the certificate was granted and *after* the certificate was made effective and had been implemented ("... it is affirmatively clear that when the Board refused on November 28, 1958 to stay the effective date of Delta's certificate it was fully aware of the arguments which subsequently led it on May 7, 1959 to impose the restrictions here complained of" (R. 104)).¹⁶ Clearly, the CAB can draw no comfort from the power specifically granted to the Courts to review CAB action.

The Petitioners attempt another argument. They try to convey the impression that Delta's certificate, although made effective, was "expressly conditioned" upon the outcome of the pending petitions for reconsideration (CAB Brief, p. 16).¹⁷ There was no contention made to the

¹⁶ And it also is clear that there was no fraud, no misrepresentation, and no clerical or other inadvertent error, involved in the issuance and effectuation of Delta's certificate. See R. 104.

¹⁷ Petitioner Lake Central attempts to go one step further and, in framing the Question Presented (Lake Central Brief, p. 2), says that the Board's order (refusing to stay the effective date of Delta's certificate), "expressly reserved the right to make such modification." The Court will notice, however, that *no such contention concerning a reservation of power was made by Lake Central in its Petition for Certiorari* (see Lake Central Petition for Certiorari, Question Presented, p. 2). The CAB's Petition for Certiorari, in presenting the question which the agency desired this Court to review, did make mention of such a "reservation of power," but the CAB seems now (on brief), to have dropped this contention. No contention was made in this proceeding by either the Petitioner in No. 492 or in No. 493 prior to the now-abandoned statement in the CAB's Petition to this Court, that the agency actually had attempted to "reserve" the power

Court below, however, that any such "express condition" was imposed in order to provide for subsequent "reconsideration" of Delta's final and effective certificate, and this Court will search the certificate (R. 54-56), the original granting order (E-13024, R. 11-53), the order refusing to stay the certificate's original effective date (E-13211, R. 57-80), and the order putting the certificate into effect (E-13245, R. 95) in vain for any such "express condition." Petitioners apparently rely upon the following statement in the Decision below (R. 106):

"... Furthermore, we have accepted, *arguendo*, the Board's argument that the language in the order quoted in footnote 4, *supra*, put Delta on notice that the Board purported to reserve to itself power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration."

The language just quoted merely explains that this particular CAB argument was not considered sufficient to alter the decision below; it does nothing but recite the CAB's argument, and clearly does not constitute recognition that any actual "condition" or "reservation of power" to reconsider existed. The CAB's language to which the Court referred was set forth in the explanatory (the "Opinion") portion, as distinguished from the "Ordering" portion, of the CAB's decision refusing to stay the effective date of Delta's certificate, and was as follows: "Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions on their merits" (R. 80 and 101). Even assuming, *arguendo*, that this language did constitute notice of some kind to Delta, *the mere fact that the CAB "served notice" that*

to reconsider Delta's final and effective certificate. And it is clear that neither Delta's certificate (R. 54-56), the "ordering" clauses of the CAB order granting that certificate (R. 49-53), or of the order refusing to stay the effective date of the certificate (R. 80) or of the order finally making that certificate effective (R. 95) contained any attempt to reserve such power.

it intended to act in violation of the statutory scheme did not give it power to do so and certainly was not an order expressly attempting a formal reservation.

Moreover, as the counterstatement shows, just a few days before the effective date of the Delta and the other new certificates, the CAB denied all requests¹⁸ for postponement of that date except in the case of a certificate which had been granted to Eastern Air Lines (R. 58-59 and 79-80). In so doing, the CAB stated that it had reviewed the petitions for reconsideration (in support of which the requests for postponement were made), "for the purposes of assessing the probability of error in our original decision" (R. 58 and 79-80), and had found that except in the Eastern Air Lines situation, they did not make "... a sufficient showing of probable legal error or abuse of discretion" to justify the requests for stay of effective dates (R. 58). The import, of course, upon which Delta acted in implementing its new authority, was that the petitions for a reconsideration would not be granted except in the case of those complaining of Eastern's new authority.¹⁹ In the latter case, where the CAB did conclude that the petitions raised serious questions, it did extend the beginning date of Eastern's certificate so as to permit effective reconsideration (R. 58 and 77-79). Obviously, therefore, Delta did not proceed to operate under its new authority "with full notice" (CAB-Brief, p. 25) nor was Delta "unmistakably aware" (CAB Brief, p. 26) that the CAB might "reconsider" the authority as the CAB now contends to this Court. To the contrary, Delta was led to believe that its certificate would not subse-

¹⁸ Including one which Lake Central had made with specific reference to Delta's certificate.

¹⁹ It might here be noted again that while the CAB stayed the entirety of the Eastern certificate involved, it invited Eastern to show the agency how the certificate might be stayed only in part, thereby both protecting the objecting party and allowing other parts of the award to go into effect (R. 78-79).

quently be altered. And, beyond peradventure of a doubt, the CAB made no express reservation of power and did not impose any express condition, providing for subsequent modification by "reconsideration."

Even if the CAB had made an actual reservation of power in Delta's certificate, the decision below would remain correct. The CAB cannot by a voluntary *ex parte* action, create powers for itself which Congress has withheld; it cannot, by a "reservation" or a "condition" empower itself to ignore the clear requirements of Section 401(f) and 401(g). In *United States v. Rock Island Motor Transit Company*, 340 U.S. 419 (1951), this Court sanctioned use of an express reservation which had been written into a Motor Carrier certificate. The original reservation there involved provided that the ICC might impose other terms to make the carrier's motor carrier operations auxiliary to the railroad operations conducted by its parent company. The new restrictions, in other words, were specific restrictions imposed within the scope of the original restriction. The Court noted that actual changes or revocations may be made in motor carrier certificates *only* under Section 212(a) of the Motor Carrier Act, 49 U.S.C. 312(a) (340 U.S. 419 at 426), the section which is substantially similar to, and upon which were patterned, Sections 401(f) and 401(g) of the Federal Aviation Act (R. 103). (Sec. 212(a) of the Motor Carrier Act is set out in Appendix A hereto.) In passing upon the Commission's action, the Court stated, therefore, that even:

"... Such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will. That would violate Sec. 212, allowing suspension, change or revocation only for the certificate holder's willful failure to comply with the Act or lawful orders or regulations of the Commission..." (340 U.S. 419 at 435).

It is clear from the foregoing that neither the CAB nor Lake Central has pointed to anything in the Act or in its legislative history, or in the facts of this case,²⁰ which countermands the clear and explicit requirements of Sections 401(f) and 401(g). Nevertheless, the CAB flatly

²⁰ Lake Central says that if the Court below is sustained, the carrier "will be compelled" to institute a new proceeding before the CAB, incur the expense of building another record which may in part duplicate the one in this case, and in the meantime be subject to diversion "of its local traffic" between Chicago and Indianapolis and between Indianapolis and Cincinnati (Lake Central Brief, p. 9). None of these contentions prove anything, of course, and certainly have no bearing on the correct interpretation of the Congressional mandate in Sections 401(f) and 401(g). But they are misleading. Lake Central speaks as if it held effective Chicago-Indianapolis authority before Delta's new certificate was granted. In point of fact, the best authority which the carrier had between Chicago and Indianapolis was the right to render a one-stop service (after meeting certain other requirements) while at least two other carriers held nonstop authority. As a result, Lake Central never was an effective participant in the traffic. For example, in March of 1958, the last period officially surveyed by the CAB before Delta's certificate was granted, Lake Central carried only 24 passengers in both directions between Indianapolis and Chicago in a 14-day period, out of a total of 3,994 passengers—or approximately six-tenths of one percent of the total traffic movement. Even a total loss of this volume of revenue—approximately \$20.00 of gross revenue per day—obviously would be *de minimus*. Its current participation is about the same. Prior to Delta's certification, Lake Central had certificate authority in the Indianapolis-Cincinnati market only because two different Lake Central route segments, one of which included Indianapolis and the other Cincinnati, happened to have a common junction point through which Lake Central could operate indirect services between the two points. Its nonstop service in the market was by virtue of an exemption order only, not certificate authority. And here it carries only about one-ninth of the traffic. Finally, in a memorandum in opposition to Delta's petition to the Court below for stay, the CAB itself said of Lake Central, "while the carrier contended that the mentioned restrictions [on Delta] should be imposed for the additional purpose of protecting it against competitive impact in relation to its existing multi-stop services, the Board made no express finding of necessity for a restriction for such purpose" (CAB Objections to Stay, p. 6, fn. 9, referring to Order E-13835, pp. 3-4, R. 83).

contends that "a Board order remains subject to modification or rescission in response to a timely petition for reconsideration, without regard to whether the Board has authorized the commencement of operations" (CAB Brief, p. 12). This proposition, if taken at face value, would leave the agency free to sit on a petition for reconsideration for as long as it pleased while the recipient of new air route authority invested the large amounts of money and time which are required to put such authority into effect; thereafter, the agency could withdraw the authority completely.

In apparent recognition that this proposition is extreme, the CAB seeks to mitigate its statement. "This is not to say," it admits at page 15 of its Brief, "that the Board has unlimited powers to keep a proceeding alive through the exercise of its rule-making authority, or that Section 401(f) of the Act is without function beyond specifying the date on which a certificate first becomes effective. Obviously," it continues, "the Board has a duty to dispose of petitions for reconsideration within a reasonable time." But the Court will note that the agency points to nothing which would require such action "within a reasonable time," and to nothing defining what, in the agency's opinion, such "a reasonable time" would be.

In short, the construction of the Act contended for by Petitioners, and despite the CAB's protestations as to what it thinks its duty is, would give the CAB unfettered power to hold back its action on petitions for reconsideration as long as it desired, while in the meantime urging the carriers to incur the expense of starting service under the new certificates.²¹ Approval of such a position would

²¹ The unambiguous language of Section 401(f)—properly applied by the Court below as written by Congress—gives a carrier to whom new route authority has been granted a clear-cut date (the "date specified" in the new certificate) beyond which the heavy capital expenditures of equipping and operating a new air route may safely be made. In contrast, the CAB's argument,

render the carefully designed statutory scheme enacted by Congress a shambles. The whole policy of the Act, against which the CAB's position militates, is one of controlled competition, giving protection and security both to air travelers and to the carriers. In order to promote both interests, a most elaborate and intricate regulation of the air transport industry was established, whereby the CAB was granted far-reaching powers in nearly all important areas where regulation was feasible. The certificate of public convenience and necessity is the keystone of this entire structure.

According to the author of the Civil Aeronautics Act in the House of Representatives, the certificate is intended as an inducement for achieving "security of route . . . and protection against cut-throat competition," *Lea*, 83 Cong. Rec. 6407 (1938). At the same time, in view of the broad powers given to the CAB, a certificate grant to an air carrier constitutes a measure of protection against extreme variations in government policy.

The security thus afforded is the inducement—often the only inducement—for a carrier to invest substantial sums and otherwise commit itself to render service which the public requires, especially service which the CAB has urged be inaugurated at an early date following certificate effectiveness. In view of the contractual nature of these certificates and the important public purposes to be accomplished, it is only natural that Congress imparted firm security by providing that the privileges and obligations of certification should commence at a specific time (on the certificate's effective date Section 401[f]); by prescribing, with equal certainty, definite procedures and clear

based on action within "a reasonable time," would leave the carrier-recipient of new authority in the untenable position of either proceeding at its peril or of bringing judicial action for mandamus to compel action by the CAB on the pending petitions for reconsideration.

standards for the modification or revocation of effective certificates (Section 401[g]); and, in order to protect the certificate holder against improvident amendment or termination of its authority, by withholding power from the CAB otherwise to alter a carrier's certificate after the agency has put certificate rights and obligations into full effect.

The decision of the Court below merely applies and gives full effect to these precisely delineated elements of the statutory scheme. The Petitioner's arguments, with no statutory or legislative history citations,²² amount to nothing but an attempt to justify an administrative agency's action in deliberately attempting for purposes of

²² At page 17 of its Brief, the CAB cites *Denver-Chicago Trucking Co. Common Carrier Application*, 27 M.C.C. 343 (1940), wherein the ICC is said to have modified an effective certificate without adhering to the provisions of Section 212(a) of the Motor Carrier Act, upon which Sections 401(f) and 401(g) of the Federal Aviation Act are based. The Motor Carrier Act, however, unlike the Federal Aviation Act, does contain specific provisions regarding reconsideration—Sec. 205(h), 49 Stat. 548, 49 U.S.C. 305(h), incorporating Sec. 17(6) of the Interstate Commerce Act, 24 Stat. 385, 49 U.S.C. 17(6). But more important, *Denver-Chicago* was decided before *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465 (1942), wherein the Commission recognized that once it makes a certificate effective, its power with respect to the certificate is expressly marked off and limited by Section 212(a) of that Act, and also before *United States v. Seatrain Lines, supra*, wherein this Court cited *Smith Bros.* with approval and held that a certificate may be modified only as specifically authorized by Congress.

At page 16 of its Brief, the CAB also says that "one must give weight to the presumption that Congress was fully aware of the normal incidents of the administrative process, including the precept that the power to decide includes the power to reconsider," when it enacted the Federal Aviation Act and its predecessor, the Civil Aeronautics Act. But Congress must be presumed equally to have been aware of the fact that in other regulatory statutes it had specifically granted agencies a right to reconsider; yet in the Civil Aeronautics and Federal Aviation Acts no such specific right was granted.

this particular case to circumvent limitations carefully imposed upon it by Congress.

II. The Decision Below Does Not Conflict With Prior Decisions Of This Court Or Of Other Circuits Or Of Administrative Agencies.

Petitioners also contend that the decision below conflicts with other court and administrative decisions. They place their heaviest reliance upon the language italicized in the following quotation from this Court's opinion in the *Seatrain* case, *supra*, 329 U.S. at 432-433 (CAB Brief, pp. 9 and 18; Lake Central Brief, p. 13):

" . . . The certificate, when finally granted *and the time fixed for rehearing it has passed*, is not subject to revocation in whole or in part except as specifically authorized by Congress . . ." (Emphasis added).

The italicized language, however, is not applicable to a proceeding under the Federal Aviation Act.

The quoted language from *Seatrain* was concerned with a certificate issued under the Water Carrier Act.²³ Contrary to the Federal Aviation Act, the Water Carrier Act does not specify the date upon which a certificate shall become effective, nor does it lay down a procedure for modifying a certificate once issued (see *United States v. Seatrain Lines, Inc.*, *supra*, 329 U.S. at 430). Moreover—again contrary to the Federal Aviation Act—the Water Carrier Act *does* contain elaborate provisions with respect to rehearing, reargument, and reconsideration of agency decisions, orders and requirements.²⁴ These two factors account for the Court's reference to the passing of the "time fixed for rehearing," and serve to distinguish that

²³ 54 Stat. 929 *et seq.*, 49 U.S.C. 901 *et seq.*

²⁴ Section 316(a) of that Act, 54 Stat. 946, 49 U.S.C. 916(a), incorporating Section 17(6) of the Interstate Commerce Act, 24 Stat. 385, 49 U.S.C. 17(6).

particular portion of the *Seatrain* decision from the case now before the Court.

The Petitioners also allege a conflict between the decision below and *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 259 F. 2d 808 (D.C. Cir. 1958) (CAB Brief, p. 18; Lake Central Brief, p. 10). Citing *Frontier* as the only case in which the precise question here involved has been raised, the CAB alleges that the District of Columbia Circuit "rejected" the position taken by the Court below in this case. It is true that *Frontier* involved a somewhat similar question to that here presented, among many unrelated questions. But that case did *not* involve the precise issue raised here concerning *diminution* of the complainant's effective authority on reconsideration. Equally important, the court in *Frontier* did not purport to rule upon any related issue. In this respect, *Frontier* merely decided a question as to the CAB's power to act upon petitions for reconsideration—and even then only with the court's approval—after a petition for *judicial review* had been filed.

Another case cited by the CAB is *Western Air Lines, Inc. v. Civil Aeronautics Board*, 194 F. 2d 211 (9th Cir. 1952) (CAB Brief, p. 18). But as the Court below held (R. 105, ftn. 11), the *Western* case "involved a Board procedure entirely different from that in the present case."²⁵

²⁵ In *Western*, subsequent to the effective date of an order approving the transfer of a certificate, the CAB imposed *labor protective* conditions. These conditions were not imposed upon a certificate, and did not affect the route authority to be held by the transferee (11 C.A.B. 701, at 713). Moreover, the CAB's power relative to the transfer of certificates is governed by Section 401(h) of the Federal Aviation Act, 72 Stat. 754, 49 U.S.C. 1371 (h), rather than Sections 401(f) and 401(g). It might also be noted that under Part II of the Interstate Commerce Act, this Court has stated that the Commission's power to amend an order approving the transfer of a certificate is more flexible than its power to amend a certificate, *United States v. Rock Island Transit*

Both Petitioners cite *Outland v. Civil Aeronautics Board*, 284 F. 2d 224 (D.C. Cir. 1960). They rely on language in that decision to the effect that where a petition for rehearing is in fact filed, "there is no final action until the rehearing is denied" (CAB Brief, p. 19; Lake Central Brief, p. 11). This language, the Petitioners assert, indicates that the CAB's jurisdiction to modify or amend a certificate is retained until the agency has finally acted on petitions for reconsideration.

The Petitioners overstate the effect of *Outland*. The decision below was concerned with the particular, substantive limitations which Congress, in Sections 401(f) and 401(g), has imposed upon the CAB's power to withdraw certificate authority after the certificate has been made effective. *Outland*, on the other hand, did not involve a certificate, and thus in no manner involved construction or application of the substantive provisions of the statute with respect to the effectiveness and inviolability of certificates. *Outland* (insofar as here pertinent) was concerned only with the effect upon the time for judicial re-

Co., *supra*, 340 U.S. at 445-446. In addition, the *Western* case involved misrepresentation in testimony before the CAB by the acquiring carrier's chief executive officer. Both the agency (11 C.A.B. 701 at 708), and the Court (194 F. 2d at 214) indicated that absent these unusual circumstances, the imposition even of labor protective conditions after a transfer's effective date might not be approved. And there is language in *Smith Bros., Revocation of Certificate*, *supra*, indicating that if a certificate has been obtained as a result of misrepresentation it may be revoked without a formal proceeding under Section 212(a) of the Motor Carrier Act, the section upon which Sections 401(f) and 401(g) of the Federal Aviation Act were patterned. The *Smith Bros.* case has been cited with approval in a number of judicial decisions, for example, in *Seatrains Lines, Inc. v. United States*, *supra*, 64 F. Supp. at 160; *United States v. Seatrain Lines, Inc.*, *supra*, 329 U.S. at 430-431; and *United States v. Rock Island Transit Co.*, *supra*, 340 U.S. at 447-448. Indeed, Delta concedes, *arguendo*, that where fraud, misrepresentation or inadvertent error is involved (*which is not this case*) the CAB does have power aside from Section 401(g) to alter the original certificate.

view where a petition for rehearing is filed with the CAB under the agency's procedural rules concerning rehearing and reconsideration.²⁶ In that case, the District of Columbia Circuit merely restated its long-standing view concerning that procedural question and decided the case on

²⁶ The CAB (Brief, p. 20, fn. 15) contends that *Outland*, together with the decision below, may have "created" a procedural problem with respect to judicial review of CAB orders in route cases. Its reasoning is that if the effectiveness of a certificate controls the agency's power to act on a petition for reconsideration directed to that certificate, a party wishing to seek judicial review may have to file a "protective petition" with the Court if, as the certificate's effective date approaches, the agency has not yet acted on that party's petition for reconsideration. We fail to see any real problem. In the first place, the CAB normally provides a period of 60 days between its decision and the date on which a new certificate will become effective (see Delta's certificate here, R. 56). This is done for the specific purpose of leaving the CAB time to act on petitions for reconsideration before a new certificate becomes effective (see pages 29-34 of this Brief, *infra*). Accordingly, the CAB usually will have disposed of petitions for reconsideration before a new certificate becomes effective. And the CAB has power, of course, to further extend a certificate's effective date if it cannot act on petitions for reconsideration within the normal 60-day period. Moreover, where a particularly large record and complex issues are involved, the CAB can give itself more than 60 days for completion of the reconsideration process—see *Southern Transcontinental Service Case*, where a 90-day "grace period" recently was written into new certificates, CAB order E-16500, dated March 13, 1961, and not yet reported. In the second place, *Outland* does not foreclose a party from foregoing a petition to the CAB for reconsideration, and immediately appealing from the original agency order if it desires (284 F. 2d at 227). Furthermore, the decision in *Outland* did not "create" any problem of "protective petitions" because, such problem has existed for years, and continues to exist; compare the *Outland* decision with the ruling of the Ninth Circuit in *Consolidated Flower Shipments v. Civil Aeronautics Board*, 205 F. 2d 449 (9th Cir. 1953). And, finally, to the extent that the decision below may have intensified the problem, the result flows only from the Court's correct application of the Congressional mandate in Sections 401(f) and 401(g), a matter which the agency should take up with Congress, not this Court (*Cf. Delta Air Lines, Inc. v. Summerfield*, 347 U.S. 74, 79-80 (1954), discussed at pages 37-38 of this Brief, *infra*).

the merits on an issue totally different than the substantive question involved here.²⁷ Thus, neither *Outland* nor the decision below deals with the substantive or the procedural matters involved in the other case.

• The CAB also cites a number of cases on page 20 of its Brief decided under the Communications Act.²⁸ These cases are likewise irrelevant here. The Communications Act contains no provision like Section 401(f) of the Federal Aviation Act, creating a definite vesting date for certificate rights and giving them continuous effect unless altered under specific statutory procedures. Broadcasting licenses cannot even be granted for more than 3-5 years.²⁹ Air carrier certificates have an entirely different purpose than Communications Act permits; see *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); Ryan, *Revocation of an Airline Certificate*, 15 Journal of Air Law and Commerce, 377 (1948).³⁰ Moreover, unlike the Federal Aviation Act, the Communications Act (in Section 405)³¹ does provide for rehearing.

• Under these circumstances, decisions dealing with FCC decisions are not precedent for Federal Aviation Act cases. For example, *Black River Valley Broadcasts v. McNinch*, 101 F. 2d 235 (D.C. Cir. 1938), cited by the CAB

²⁷ Similarly, *Waterman Steamship Corp. v. Civil Aeronautics Board*, 159 F. 2d 828 (5th Cir. 1947), *rev'd on other grds.*, 333 U.S. 103, and *Braniff Airways v. Civil Aeronautics Board*, 147 F. 2d 152 (D.C. Cir. 1945), both cited by the CAB at page 19 of its Brief, were concerned only with the timeliness of a petition for review, with no agency reconsideration of an effective certificate being involved in either case.

²⁸ 48 Stat. 1064, 47 U.S.C. 151 *et seq.*

²⁹ Communications Act, Sec. 307(d), 48 Stat. 1083(d), 47 U.S.C. 307(d).

³⁰ The author is a former Chairman of the Civil Aeronautics Board.

³¹ 48 Stat. 1095, 47 U.S.C. 405.

at page 20 of its Brief, turned upon a petition for rehearing under Section 405 of the Communications Act. The Court said:

"... There can be no doubt that Watertown was exercising a procedural right *specifically provided for by Congress*. The filing of the petition for rehearing, of course, stayed the proceedings and reopened the case. . . ." (101 F. 2d at 239-240, emphasis added).

No such finding could be made under the Federal Aviation Act.³²

Finally, both Petitioners point to five cases wherein the CAB supposedly has modified, upon reconsideration, certificates which it previously had made effective (CAB Brief, p. 18, ftn. 14; Lake Central Brief, p. 7, ftn. 12). Only four of the cited cases actually involved certificate modifications,³³ and in none of them did the affected carrier thereafter raise any objection. The four uncontested cases constitute only scattered exceptions to a *consistent* and *contrary* course of action by the CAB ever since 1948—a course of conduct which clearly has constituted agency recognition of its lack of power to reconsider an effective certificate. In its *Kansas City-Memphis-Florida Case*, 9 C.A.B. 401 (1948), the CAB said:

"... We have grave doubt, however, as to our possession of such power . . ." (9 C.A.B. 401 at 408-409).

³² It might also be noted that under the CAB's rule governing reconsideration, the filing of such a petition does *not* serve to stay the proceeding or to reopen the record as is true under the Communications Act, *CAB Rules of Practice in Economic Proceedings*, CAB Rule 37, 14 C.F.R. 302.37 (1960 Supp.).

³³ The fifth case, *United-Western Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950) involved a certificate transfer only, and is discussed *supra*, pp. 25-26 of this Brief, under the title *Western Airlines, Inc. v. Civil Aeronautics Board*, 194 F. 2d 211 (9th Cir. 1952).

In view of this doubt, the agency went on to announce that:

"... in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case" (*ibid.*).

Since rendering this decision, the CAB consistently has made new certificates effective sufficiently long after the decision date, usually sixty days (as in this case—R. 56), to permit reconsideration if requested, and has conditioned even such an advance effective date upon a power reserved unto itself to extend the date further if necessary to allow additional study of petitions for reconsideration.³⁴ Moreover, in cases decided before this one, the CAB repeatedly has used this power to postpone the effective date of certificates during reconsideration.³⁵

³⁴ To cite but a few typical and varied instances where the Board has reserved this power, see *Chicago Helicopter Service Case*, 9 C.A.B. 687, 694 (1948); *TWA, Removal of Santa Fe-Albuquerque Restriction*, 16 C.A.B. 265, 272 (1952); *Indiana-Ohio Local Service Case*, 16 C.A.B. 880, 942-943, 944 (1953); *Frontier, Route No. 93-Renewal Case*, 16 C.A.B. 948, 958 (1953); *Southern Certificate Renewal Case*, 17 C.A.B. 116, 123 (1953); *Service to Fargo, N. Dak. Case*, 17 C.A.B. 580, 615 (1953); *Texas Local Service Case*, 18 C.A.B. 34, 55 (1953); *Ronanza Renewal Case*, 19 C.A.B. 779, 799 (1955); *Service to Ely, Nevada Case*, 20 C.A.B. 402, 407 (1955); and Order E-13024 in this very case, R. 56.

³⁵ E.g. see the successive postponements in *Additional California-Nevada Service Case*, 11 C.A.B. 39, 51 (1949), 11 C.A.B. 1081 (1950) (Order further extending effective date as "required by the public interest to maintain the *status quo* for a sufficient period of time to permit the Board to consider adequately the contentions" made in petitions for reconsideration), 11 C.A.B. 1082 (1950) (Order further extending effective date for the same reason); *New York-Florida Case*, 24 C.A.B. 94, 136 and 143 (1956), granting Delta and National Airlines, Inc., certificates to be effective November 27, 1956, and Order E-10785, dated No-

In recently amending its procedural rule with respect to reconsideration of orders so as to reduce the time for filing such petitions from 30 to 20 days following a CAB decision, the agency noted:

"It is the Board's normal practice in route proceedings to make certificate awards effective 60 days after issuance of the final opinion and order. Thus, under present filing procedures [because 10 days were allowed for answers to petitions], there normally remains only a 20-day period between the completion of filings and the date upon which the certificate becomes effective."

"It has become increasingly evident, particularly with the growing size and complexity of the Board's route proceedings, that a period of 20 days is wholly inadequate and imposes an undue burden upon the Board and its staff when some action by the Board is necessary or desirable before new or amended certificates take effect . . ." (PR-34, adopted by the CAB on February 11, 1959, 24 F.R. 1152, emphasis added).

Moreover, as the Court below found (R. 105), the CAB even has represented to at least one court that it has been the agency's practice heretofore to allow a "grace period" between certificate issuance and its effectiveness, and to stay a certificate's effective date if necessary in order to give the agency time to consider the merits of petitions for reconsideration, *Southwest Airways v. Civil Aeronautics Board*, 196 F. 2d 937, 938 (9th Cir. 1952). In its Brief to the Ninth Circuit in that case (pp. 14-15 thereof), the CAB told the Court:

" . . . These clauses providing for a future effective date for the certificate were inserted therein for the stated purpose of giving the parties to the proceeding an opportunity to file petitions for reconsideration of the Board's supplemental decision and to insure

November 26, 1956 and not reported, staying said effective date "pending disposition of the petitions for reconsideration in this proceeding"; and Order E-13211 in this case, R. 58, 78, and 80.

time for the Board to act thereon prior to the effective date of the certificate . . .

" . . . The language therein [in what is now Section 401(f) of the Federal Aviation Act] requiring that a certificate 'shall continue in effect until suspended or revoked as hereinafter provided' comes into play only 'from the date specified' for effectiveness in the certificate . . ." (Emphasis added).

Accordingly, in its opinion, the Ninth Circuit stated:

"Southwest also argues that the rescission of a still ineffective certificate must be done in accordance with the revocation provisions of 49 U.S.C.A. Sec. 481(h) [now Sec. 401(g) of the Federal Aviation Act]. We do not agree. The certificate was by its terms in a state of suspension totally dependent on the Board's order which had sired it. The Board points to its administrative practice of postponing certificates of this character so that time may be allowed for petition for reconsideration of the parent orders. See Kansas City-Memphis-Florida case, 9 C.A.B. 401 (1948). The Board certainly has the power to reconsider its orders and set them aside, 49 U.S.C.A. Sec. 645(a) and (d), and if certificates not yet effective are dependent on those orders, they will also be extinguished. The situation is totally different from that in which a certificate has become effective" (196 F. 2d 937, at 938; emphasis added).

Furthermore, just recently the CAB has issued two orders in which the agency again has recognized that unless it stays the effective date of certificates until it can dispose of petitions for reconsideration, it will lose the power to do so. The first order was issued in the CAB's *Great Lakes Local Service Investigation*, CAB Docket 4251. Except for the actual ordering language staying the effectiveness of the new certificates there involved, that order in its entirety reads as follows:

"Various petitions for reconsideration of the Board's decision in the above-entitled proceeding (Order E-15695, dated August 25, 1960) have been filed and it appears that the Board's consideration of these peti-

tions will not be completed until after November 8, 1960, the date presently fixed for making effective the amended certificates issued as part of the Board's decision herein. *In order to preserve the status quo until the Board has had adequate opportunity to dispose of the aforementioned petitions, we find that it is in the public interest to stay the effectiveness of the certificates in question*" (Order E-15995, November 4, 1960, not yet reported, emphasis added).

Thereafter, the CAB amended this order on behalf of one of the carriers involved but, in doing so, again recognized that where reconsideration is likely it must stay the affected certificates:

"After considering the matters presented by North Central in the light of the record in this proceeding, the Board has determined that any further postponement of the effective date of North Central's amended certificate, insofar as it relates to the newly awarded routes in Michigan, is unnecessary and would not be in the public interest. On the other hand, since various petitions for reconsideration of the award of the Detroit-Cleveland route segment to North Central are now pending before the Board, the Board concludes that the stay of North Central's amended certificate insofar as it authorizes service over this segment should continue in effect until disposition of the petitions relating to this issue.

"It further appears that the Board will be unable to dispose of the petitions for reconsideration in this proceeding prior to December 1, 1960, the date upon which the stay provided in the aforementioned order E-15995 is due to expire. In these circumstances, we will also extend this stay insofar as it is applicable to the certificates of Lake Central, Allegheny and Piedmont, until disposition of the petitions in question" (CAB Order E-16071, November 25, 1960, not yet reported; emphasis added).³⁶

³⁶ It might also be noted that in the first paragraph of the above quotation, the CAB undertook to stay only a portion of the awards made to North Central Airlines, Inc., while leaving other portions to go into effect.

Another order similar to E-15995 (first quoted above) also recently was issued in the CAB's Docket 10161, *Mohawk Temporary Points Case*, Order E-16326, dated February 1, 1961, and not yet reported.

It is clear from the foregoing that neither the CAB nor Lake Central has established any inconsistency between the decision below and other decisions by the courts or by administrative agencies, including the CAB itself. On the other hand, it is manifest that the decision under review does fully accord with prior case law. As already seen, the decision is in accord with *United States v. Seatrain Lines, Inc.*, *supra*, wherein this Court, like the Court below, held that certificates can be modified only in the manner specifically authorized by Congress.

The *Seatrain Case* was not the first time, nor the last, that in analogous situations it has been decreed that an agency must follow procedures specifically prescribed by Congress, and not attempt by inference to create for itself other powers not expressly conferred. Thus, in *Seatrain*, this Court cited an earlier decision by the Interstate Commerce Commission under the language of Section 212(a) of the Motor Carrier Act (Appendix A hereto), which Section is substantially similar in content to Section 401 (f) and 401(g) of the Federal Aviation Act. As this Court put it:

"... in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in Section 212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Re Smith Bros. Revocation of Order*, 33 M.C.C. (F) 465" (329 U.S. 429, at 430-431).

As the Interstate Commerce Commission had put it in the *Smith Bros.* case itself:

"... We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefore appears and until all controversy is determined, but *once a certificate, duly and regularly issued, becomes effective our authority to terminate it is expressly marked off and limited.* All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated but *the certificate marks the end of the proceeding*, just as the entry of a final judgment or decree marks the end of a court proceeding . . ." (Emphasis added).

In exact accord, see *Hergott v. Nebraska State Ry. Commission*, 15 N.W. 2d 418 (Neb. 1944). For a state case involving the same factual situation presented here, and reaching the same conclusion as the court below, see *Smith v. Wald Transfer & Storage Co., Inc.*, 975 S.W. 2d 991 (Texas 1936).

One of the more important decisions decided since the *Seatrain* case is *United States v. Watson Bros. Transportation Company*, 350 U.S. 927 (1956), affirming 132 F. Supp. 905. A three-judge District Court in that case ruled, under those provisions of the Motor Carrier Act which are similar to Sections 401(f) and 401(g) of the Federal Aviation Act, that:

"... The only statutory authority for the suspension, change, or revocation of such a certificate by the Commission is contained in Section 212(a) . . .

"... Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212(a), it is invalid.

"... the order . . . is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued" (132 F. Supp. 905 at 909).

In the *Watson* case there was a deliberate attempt by the Interstate Commerce Commission to implement a change of heart through modification, without notice and hearing, of a previously-effective certificate.

Except for the fact that no petition for reconsideration had been filed (the Commission acted upon its own motion) the *Watson Case* is on all fours with the present one. As the Court below found (R. 104), in this case there is no suggestion of inadvertent error, no suggestion that at the time it was put into effect Delta's certificate mistakenly contained greater authority than the Board intended to confer by its earlier decision granting the certificate. And, as noted earlier, the Court further found it to be "affirmatively clear" that when the CAB refused, just prior to the certificate's effective date, to extend that date as Lake Central had requested in order to permit reconsideration, the CAB was fully aware of the arguments which subsequently led it on May 7, 1959 (five months after the certificate became effective and four months after Delta had inaugurated service under that certificate) to impose the restrictions of which Delta complains.

The fact is, therefore, that in the interim the CAB changed its policy, an arbitrary—or at least unilateral—administrative determination which did not and cannot invest the agency with authority to modify an effective certificate without adherence to Sections 401(f) and 401(g) procedures, *United States v. Watson Bros. Transportation Company, Inc., supra*; *American Trucking Association, Inc. et al. v. Frisco Transportation Company*, 358 U.S. 133, 156 (1958). Clearly, the CAB's actions were all taken deliberately and, like the Interstate Commerce Commission action involved in *Watson*, constitute an invalid attempt, contrary to specific statutory limitations, to change a certificate duly issued.

The foregoing³⁷ makes it clear that the decision below

³⁷ The CAB, in footnote 17 on page 21 of its Brief, also cites *Fuller-Toponce Truck Co. v. Public Service Commission*, 96 P. 2d 722, 724-725 (Utah 1939) and *Hazard-Hayden Bus Co. v. Black*, 293 Ky. 379 (Ct. App.), 169 S.W. 2d 21 (1943). The cases are not in point. The first did not involve any issue as to an

is not in conflict with the cases relied upon by Petitioners but, to the contrary, is fully consistent with a long line of court and administrative agency cases.

III. The Decision Below In No Manner Will Impair The Administrative Process

The CAB's charge that the decision below will impair its administrative responsibilities is not an argument properly directed to this Court.

As long as the decision comports with the statute and with the decided case law, as it does, any policy problems thereby created for the Board are for Congress to resolve. This Court heretofore has rejected a CAB argument that it should be allowed to depart from its governing statute for reasons of policy, *Delta Air Lines, Inc. v. Summerfield, supra*. The Court told the CAB that there, as here, it had misconceived its remedies?

"The Board makes an extended argument of policy against that position in elaboration of the reasons it advanced for not offsetting the excess earnings from domestic operations against the international subsidy rate. . . . It maintains that maximum operating efficiency on the part of air carriers and the development of air transportation—prominent objectives of the Act . . .—will be better served by setting subsidy rates on a divisional rather than on a system basis. This may be so. But that is a matter of policy for Congress to decide . . ." (347 U.S. at 79-80; emphasis added).

So it is here. Congress has prescribed a definite procedure for changing an effective certificate, whether the

agency's power to reconsider (the Utah Commission was clearly granted such right by statute, in contrast to the lack of such grant in the Federal Aviation Act) and in the second case, there never was a validly-issued certificate. The second case deals only with a motion to reopen in a situation where the movant had alleged that it had been denied a fair hearing.

change is to be revocation or modification (see R. 104). It did so because either type of change could seriously affect valuable operating and property rights.

Not only are the Board's policy appeals thus irrelevant, but in various respects they are incorrect. The Board complains, for example, that a consequence of the decision below may be "unduly hasty decisions on requests for reconsideration raising complex problems" (CAB Brief, p. 11).

As mentioned herein earlier, however, the CAB invariably makes new certificates effective at least 60 days after the date of the granting decision, in order to allow sufficient time for reconsideration (see, for example, R. 56). The CAB requires petitions for such reconsideration to be filed within 20 days after the decision, and answers thereto 10 days later, leaving the CAB 30 days during which to act upon those petitions without worrying about the original effective date.³⁵

If a proceeding should be so complex as to indicate that the resulting thirty days will be insufficient, the CAB can always write a longer grace period than sixty days into a new certificate when it is granted. As seen above, the agency recently has done this in another case.³⁶ If this is not done, and the thirty-day period actually proves to be inadequate in any particular case, all the CAB has to

³⁵ CAB Rule 37(a), 14 C.F.R. 302.37(a) (1960 Supp.). At the time the agency case here involved was decided, 30 days were allowed for filing petitions for reconsideration. 14 C.F.R. 302.37 (a) (1956 Rev. ed.). Thereafter, Rule 37 was amended (PR-34, adopted by the CAB on February 11, 1959—24 F.R. 1152) so as to reduce the time for filing to 20 days, in order to give the CAB and its staff more time "... when some action by the Board is necessary or desirable before any new or amended certificates take effect" (*ibid.*). See page 31 of this Brief, *supra*.

³⁶ *Southern Transcontinental Service Case*, CAB Docket 7984, *et al.*, Order E-16500, *supra*, where 90 days were provided.

do is extend the effective date of new certificates until it finishes its job of reconsideration. Indeed, in this very case, in the same order in which it refused to stay the effective date of Delta's certificate, the CAB *did* extend the effective date of a new certificate granted to another carrier because in that one instance it found that a petition for reconsideration had raised a point sufficiently valid to perhaps require revision of the certificate (Order E-13211, R. 58 and 77-79).⁴⁰ No such finding was made in the case of Delta's certificates.

Clearly, "hasty reconsideration" need not result from the decision below. A former Chairman of the CAB, writing with respect to the agency's *Kansas City-Memphis* case, *supra* (pp. 29-30), decided in 1948, has pointed out that the view of the law applied by the Court below "does not mean frustration of the Board's ability to reconsider its decisions in certificate cases," Ryan, *Revocation of an Airline Certificate, supra*, 15 Journal of Air Law and Commerce at 389.

The CAB also complains that further stay of a certificate's effective date in some cases might disable the agency from immediately putting needed services into effect while petitions for reconsideration are pending (Brief, pp. 11 and 22).⁴¹ In this connection it must be noted that the agency can stay only a portion of a new

⁴⁰ Also see CAB Order E-16071, quoted *supra* p. 33 of this Brief, and Footnote 35, *supra*.

⁴¹ This argument is a strange one in the context of this case. The administrative proceeding here involved commenced on May 25, 1955, when it was noticed for prehearing conference. The CAB took three years and four months to reach a decision (on September 30, 1958, R. 11). Even then, without a further short delay if necessary for completion of the reconsideration process, certificates were not to be effective until November 29, 1958 (R. 56).

award if it desires to give protracted reconsideration to petitions seeking reconsideration of that portion, while allowing other portions to go into effect. The CAB says (Brief, p. 23) that such a procedure is impractical. But as shown previously in this Brief, the agency has done so on a number of occasions—see CAB Order E-16071, quoted at page 33, *supra*, and the agency's invitation to Eastern Air Lines, Inc. in this very case, Order E-13211, R. 78-79).⁴²

⁴² The CAB makes one other curious argument on this general subject. At page 10 of its Brief, it says, "we stress that Delta resisted a stay of the effective date of the certificate so that it might earn revenues during the pendency of the applications for reconsideration . . ." (Emphasis added). The Court will understand that there is absolutely nothing in the record of this appeal, or in the record before the agency, which will support the underscored portion (or, indeed, any portion) of this CAB statement.

This is the first time that any such argument has been presented in any portion of this case. Such an inflammatory remark is highly prejudicial, implying some lack of integrity in Delta's representations to the Federal Courts and to the agency.

The fact is that except in the limited instance noted below, Delta neither sought a stay of the effective date of new certificates granted to any party in the agency proceeding, nor did Delta at the administrative level oppose the requests of others for stay. The only point at which Delta resisted a stay of Delta's certificate was during the course of a separate court proceeding in the Second Circuit which Eastern Air Lines had initiated (*Eastern Air Lines, Inc. v. Civil Aeronautics Board*, 271 F. 2d 752 [2d Cir. 1959]). (In connection with this resistance, Delta sought from the CAB a stay of Eastern's certificate to be co-extensive with any stay of Delta's certificate issued by the agency for the convenience of the Court. This request became moot when Eastern's certificate was extended for other reasons—R. 78). And even then, Delta's objections to a Court stay were not in any manner based upon the theory that the CAB would still have power to act on a petition for reconsideration after Delta's certificate became effective, but rather upon the straightforward argument that—as later events proved true—Eastern had no likelihood of success on the merits of its appeal, and had not shown that it would be irreparably injured if a stay did not issue or that the public would not be so injured if a stay did issue.

Moreover, the Court must fully appreciate the import of this last CAB argument. If, despite the CAB's past contrary policy and despite Delta's inauguration of service under its new authority before the agency attempted to impose the restrictions here in question, those restrictions nevertheless can be imposed under a theory which has as a premise the desirability of commencing new service while petitions for reconsideration are pending, then the CAB can in any case issue a certificate no matter how extensive, indicate that service thereunder should commence as soon as possible, but then sit on pending petitions as long as it desires and, whenever the whim strikes it, disrupt all that has been done in reliance on its previous action. As the Texas Court said in *Smith v. Wald Transfer, supra*, in such an event:

"... There would be no way of knowing with reasonable certainty when the commission's jurisdiction had terminated and its orders had effectively become final. This is fairly illustrated in the instant case. The certificate was granted March 29, 1934. No official action was taken by the commission until October 30, 1934, and it did not pass upon the matter until December 17, 1934. During all of this time appellee was operating under the order with the knowledge and at least tacit consent of the commission. To give validity to the December order would in effect render this operation illegal retroactively. . . ." (97 S.W. 2d at 991).

The foregoing is not merely a hypothetical strawman. In this very case, in addition to granting Delta new authority in the markets here in question, the CAB made a number of substantial other route awards. For example, it granted Delta a new route between Detroit and Miami via many intermediate points, granted Northwest Airlines, Inc. ("Northwest") a similar route between Chicago and Miami, and granted Capital Airlines, Inc. ("Capital") one between Buffalo and Miami (Order E-13024, R. 49-53).

Those awards also were put into effect on December 5, 1958 (Order E-13245, R. 95). In its Order E-13211 (R. 57 *et seq.*) issued just a few days previous, the Board denied the petitions which various parties had filed for a postponement pending reconsideration of those grants, just as in that same order it denied the petitions for stay of Delta's new authority in the ten markets here involved. In doing so, the Board in effect directed the carriers to implement the new Great Lakes-Florida authorities immediately. It said:

"... We are of the opinion that these services should be put into operation at the advent of the peak winter season in order to give the traveling public the full advantage thereof. ... This will afford the traveling public the advantages of the new services we have found required *immediately* during the 1958-1959 season" (Order E-13211, *supra*, dated November 28, 1958, at R. 59, emphasis added).

These new Florida routes constituted *extensive* certifications and consequently could be implemented—as they were implemented following the CAB's foregoing direction—only at great expense.

But if the Board's theory were right, on May 7, 1959 when it attempted to withdraw Delta's authority in the markets here involved, it also could have withdrawn *all* of the new Florida awards to Capital, Delta and Northwest; despite the huge sums which had been invested therein in conformance with the Board's earlier direction. Until that date, petitions were still pending before the Board for reconsideration and withdrawal of those authorities (see Order E-13211, at R. 79-80 and Order E-13835 at R. 81-82). The fact that the CAB then denied the petitions is no help. If the agency had the power to grant the petitions which sought imposition of the Delta restrictions here in question, it had equal power to withdraw all of the immense Florida certifications on the basis of which so much investment had been made.

It is clear that the exercise of any such power would be most arbitrary and not in keeping with basic principles of due process. Congress did not grant the Board any such power, and nothing in the statute or its history indicates that Congress intended to do so by implication as Petitioners now argue. But Congress did impose specific limitations upon the agency's power to modify effective certificates, limitations which protect the carriers and the public while leaving the CAB free to adopt reasonable procedures, which properly were applied by the Court below, and which will not unduly impede the administrative process.

CONCLUSION

In consideration of the foregoing, Delta Air Lines, Inc., respectfully prays that this Court will affirm the decision of the United States Court of Appeals for the Second Circuit in *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 280 F. 2d 43 (2d Cir. 1960).

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April 20, 1961

APPENDIX A

Statutes and Regulations Involved

I: *Federal Aviation Act of 1958*, 72 Stat. 737 *et seq.*,
49 U.S.C. 1301 *et seq.*

A. *Section 401(f)*

EFFECTIVE DATE AND DURATION OF
CERTIFICATE

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service."

(72 Stat. 754, 49 U.S.C. 1371[f])

B. *Section 401(g)*

AUTHORITY TO MODIFY, SUSPEND,
OR REVOKE

"The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such

certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

(72 Stat. 754, 49 U.S.C. 1371[g])

II. *Motor Carrier Act* (Part II of Interstate Commerce Act), 49 Stat. 543, as amended, 49 U.S.C. 301 *et seq.*

A. *Section 212(a)*

SUSPENSION, CHANGE, REVOCATION
AND TRANSFER OF CERTIFICATES,
PERMITS, AND LICENSES

"Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of

this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: . . ."

(49 Stat. 555, as amended, 49 U.S.C. 312[a]).

III. *Regulations of the Civil Aeronautics Board*, 14 C.F.R. 302.1 *et seq.*

A. *Rule 37*

"(a) *Time for Filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within twenty (20) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. . . ."

(14 C.F.R. 302.37)

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Supreme Court, U.S.

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OCT 19 1960

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

No. **493**

LAKE CENTRAL AIRLINES, INC., *Petitioner*

v.

DELTA AIR LINES, INC., *Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

ALBERT F. GRISARD
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613 15th Street, N. W.
Washington 5, D. C.
Attorney for Petitioner

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No.

LAKE CENTRAL AIRLINES, INC., *Petitioner*

v.

DELTA AIR LINES, INC., *Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

*To the Honorable Chief Justice, and the Associate
Justices of the Supreme Court of the United States.*

Petitioner, an intervenor below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the cause of *Delta Air Lines, Inc. v. Civil Aeronautics Board*, Docket No. 25852 (No. 248—October Term, 1959) on July 21, 1960.

OPINIONS BELOW

The opinions and orders of the Civil Aeronautics Board are unreported. They are reproduced at pages 1313a-1400a, 1469a-1497a and 1509a-1536a of the Joint Appendix¹ and at pages 1593a-1595a and 1606a-1610a of the Additional Joint Appendix² in the cause below. The opinion of the United States Court of Appeals for the Second Circuit is reported as 280 F. 2d 43 and reproduced as Appendix A hereof.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 21, 1960. The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254.

QUESTION PRESENTED

The sole question presented is whether the Civil Aeronautics Board may amend a certificate of public convenience and necessity after the effective date thereof by acting upon timely filed petitions for reconsideration of the Board order issuing such certificate.

STATUTE INVOLVED

Consideration of this case involves Sections 401(f) and 401(g) of the Federal Aviation Act of 1958 [72 Stat. 755-56, 49 U.S.C. 1371(f) and (g)]

Section 401(f) provides:

“Each certificate shall be effective from the date specified therein, and shall continue in effect until

¹ Hereinafter referred to as “J.A.” followed by the appropriate page designation.

² Hereinafter referred to as “A.J.A.” followed by the appropriate page designation.

suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service."

Section 401(g) provides:

"The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate."

STATEMENT OF THE CASE

The Civil Aeronautics Board ("Board") on May 25, 1955 instituted a proceeding to consider the applications of certain air carriers for service in an area between the Great Lakes and southeast United States, later identified as the "Great Lakes-Southeast Service Case". Petitioner is an air carrier certificated by the Civil Aeronautics Board to engage in so-called local, or short-haul, air transportation in the Great Lakes area over Route No. 88. The Board denied motions for the consolidation of local air carrier applications in the above proceeding, finding that the proceeding involved "predominantly" long-haul services and that the interests of any local service carrier, i.e., Petitioner, which might be adversely affected would be adequately protected by granting such local service carrier leave to intervene and, where overlapping applications were involved, to urge the mutual exclusivity of the respective trunkline and local carrier proposals.³

Insofar as is relevant to this petition, Petitioner's certificate of public convenience and necessity for Route No. 88 authorizes it to operate between Chicago, Illinois and Indianapolis, Indiana, via one or more intermediate points and between Indianapolis and Cincinnati, Ohio.⁴ The Board consolidated in the proceeding before it an application of Delta Air Lines, Inc. ("Delta") which sought, *inter alia*, the addition of Indianapolis as an intermediate point of Delta's existing Route 54 between Cincinnati and Chicago.

³ J.A. 82a-83a.

⁴ Petitioner has for several years operated nonstop service between Indianapolis and Cincinnati, a distance of 98 miles, pursuant to exemption authority received from the Board.

Petitioner participated fully as an intervenor in every stage of the proceeding before the Board's Hearing Examiner and the Board and introduced evidence to show the diversion of its existing and future traffic revenues which would result from the certification of another carrier in the Chicago-Indianapolis and Indianapolis-Cincinnati markets unless such newly authorized services were subject to certain so-called long-haul restrictions. In the case of Respondent, Petitioner urged that such restriction should require that carrier to originate or terminate all of its flights which served both Chicago and Indianapolis, or both Indianapolis and Cincinnati, at Atlanta, Georgia, or a point south thereof.

The Board's original opinion and order were issued on September 30, 1958⁵ and, among other things, granted Respondent authority to serve the Chicago-Indianapolis and Indianapolis-Cincinnati markets without, however, being subjected to the long-haul restriction which Petitioner had urged the Board to impose on any such authorizations. The Board did impose a similar restriction on other awards in order to protect Petitioner's traffic. Petitioner filed a petition for reconsideration of the Board's original opinion and order within the time permitted by the Board's Rules of Practice⁶ and prior to the effective date of the amended certificate issued to Respondent, and renewed its request for the imposition of a long-haul restriction on Respondent's Chicago-Indianapolis and Indianapolis-Cincinnati services. The amended certificate issued to Respondent by the Board's opinion and

⁵ J.A. 1313a-1400a.

⁶ A.J.A. 1587a-1593a.

order of September 30, 1958 was to become effective November 29, 1958.⁷ (For reasons not relevant here, this effective date was extended to December 5, 1958.)^{*}

On November 28, 1958, the Board issued its opinion and order disposing of the petitions for reconsideration to the extent that such petitions requested stay of the Board's order of September 30, 1958.⁸ The Board stated that "because of the detailed matters raised in the petitions for reconsideration, it will not be possible to finally dispose of them until after November 29. . . . An order disposing of the petitions for reconsideration in full will be issued at a later date."¹⁰ The Board's opinion and order concluded as follows:¹¹

"In the interim, the Board will address itself to the merits of the petitions for reconsideration, and our order dealing with these matters will issue at a later date. To the extent that we have considered the petitions for reconsideration in the present order we have done so only for the purposes of assessing the probability of error in our original decision. We feel that such action is necessary to a fair consideration of the stay requests, and is in no way prejudicial to the legal rights of those parties seeking reconsideration. *Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits.*" (Emphasis supplied)

⁷ J.A. 1381a-1384a.

⁸ A.J.A. 1593a-1595a.

⁹ J.A. 1469a-1497a.

¹⁰ J.A. 1470a.

¹¹ J.A. 1495a-1496a.

Inasmuch as the Board in the past had, in response to timely filed petitions for reconsideration, amended or modified certificates after their effective dates, Petitioner did not seek judicial stay of the effective date of Respondent's amended certificate. Respondent itself, in a document filed May 7, 1959 in another, related, proceeding, indicated that it was, as of that date, relying upon its own pending petition for reconsideration of the Board's decision of September, 30 1958 to accomplish further amendment of its already-effective certificate of public convenience and necessity without additional hearing.¹²

On May 7, 1959 the Board adopted and issued its Second Supplemental Opinion and Order on Reconsideration¹³ which, among other things, amended Respondent's certificate of public convenience and necessity, as effective December 5, 1958, to require that Respondent's flights serving Chicago and Indianapolis, and Indianapolis and Cincinnati should originate or terminate at Atlanta or a point south thereof. Respondent thereafter sought review of the Board's orders in the United States Court of Appeals for the Second Circuit. The jurisdiction of the Court of Appeals was invoked under Section 1006 of the Federal Aviation Act of 1958 [72 Stat. 795, 49 U.S.C. 1486]. Similar amendments of the effective certificates of Eastern Air Lines, Inc. and Capital Airlines, Inc. made by the Board's supplemental opinion and order of May 7, 1959 and an earlier order in response to timely-filed petitions for reconsideration, in order to protect the traffic

¹² A.J.A. 1602a-1604a..

¹³ J.A. 1509a-1536a.

of other local service carriers, were not judicially questioned by either Eastern or Capital.

Petitioner was admitted as an intervenor in the cause below and supported the action of the Board on reconsideration as well as the Board's authority to take such action.

The Court below reversed the Board's decision of May 7, 1959 and set aside the Board's order attached thereto, finding that:

"... under Sections 401(f) and 401(g) of the Federal Aviation Act, absent fraud, misrepresentation or clerical error in the original issuance of the certificate, it is only, in a proceeding satisfying the requirements of Section 401(g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions."

In so ruling, the Court accepted the Board's contention that the language referred to in footnote 11, *supra*, put Respondent on notice that the Board "purported to reserve to itself the power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration."¹⁴

REASONS FOR GRANTING THE WRIT

The decision below is erroneous and results from both a misconstruction of the Federal Aviation Act and a failure of the court below to give proper recognition to the decision of this Court in *United States v. Seatrain Lines*, 329 U.S. 424 (1947).

The court below has read the Act so as to make Sections 401(f) and 401(g) applicable merely upon the

¹⁴ Appendix A, page 10a.

¹⁵ Appendix A, page 10a.

technically effective date of the certificate, even though timely petitions for reconsideration of the award of amended certificate authority have been received and are still pending the Board's decision. Such reconsideration as was sought by Petitioner was based upon the identical record on which the Board's amended award to Respondent was founded. If the holding of the court below is not reversed, Petitioner will be compelled to institute a new proceeding before the Board, bear the considerable expense of making another record which in large part will be duplicative of the portions of the prior record upon which its petition relied, and in the meantime be subject to diversion of its local traffic between the pairs of points in question until the Board's decision in the new proceeding is issued. The Board will likewise be put to considerable expense and trouble, all because of the overly-technical reading given Section 401(f) and 401(g) by the court below. Petitioner believes that such sections, properly construed in the light of the Board's prior uncontested actions and the relevant decisions of other courts, relate only to a certificate which has become final in the sense that the Board has lost all further power to deal with such certificate in the same proceeding in which it was issued. Certainly, an award which is the subject of timely filed petitions for reconsideration does not possess the degree of finality which would be the case had no petitions for reconsideration been filed. Where such petitions are still pending upon the "effective date" of the award, petitioner urges that the effect is to keep the proceeding alive until the Board has finally disposed of all such petitions.

In *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C. 1958), the contention

was made that the Board erred in failing to postpone the effective date of various certificates until after disposition of petitions for reconsideration, in that the Board was without power to grant any relief on reconsideration in relation to an effective certificate. An additional argument was made that the Board was also impotent to act because of the filing of the petition for judicial review—a point not present here. The court disposed of these contentions with the following findings:

“We do not find the order denying reconsideration invalid because rendered after this petition was filed. No harm was done. Had the Board been of a mind to grant reconsideration, it could have so indicated and a motion to remand would have been in order.” (at p. 811)

Thus, in the opinion of the United States Court of Appeals for the District of Columbia Circuit, the Board retained the power to grant reconsideration even after the effective date of the amended certificates at issue. In *Waterman Steamship Corp. v. Civil Aeronautics Board*, 159 F. 2d 828 (1947), reversed on other grounds, 333 U.S. 103, the Fifth Circuit held that a petition for reconsideration “operated to retain the Board’s authority over the order” (159 F. 2d at p. 829).

The *Seatrain* case involved a situation in which the Interstate Commerce Commission, some eighteen months after the time for seeking reconsideration had elapsed, on its own motion reopened an award because of a change in Commission policy. There, the focus was upon the fact that a significant period of time had elapsed since the Commission had *finally* disposed of the proceeding. In holding that the Commission could not reopen the award, this Court stated:

"The certificate, when finally granted *and the time fixed for rehearing it has passed*, is not subject to revocation in whole or in part except as specifically authorized by Congress." (pp. 432-33, emphasis added)

Thus, the Court significantly recognized that had the time for rehearing not passed (as it very clearly had not in the present case), it would have had no objection to the reopening ordered by the Commission.


CONCLUSION

The decision below is erroneous and conflicts with the decisions of this Court and other circuits. If this conflict is not resolved, in Petitioner's opinion the way will be opened for a deluge of filings seeking premature judicial stays of Board orders because of the confusion created by the decision below and the parties' inability to determine at what point the Board's authority to reconsider its own decisions and orders terminates. A writ of certiorari to the United States Court of Appeals for the Second Circuit should therefore be granted.

Respectfully submitted,

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Attorney for Petitioner

Dated: October 19, 1960



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 248—October Term, 1959.

(Argued March 30, 1960

Decided June 29, 1960.)

Docket No. 25852

280 F. 2d 43

DELTA AIR LINES, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*,

LAKE CENTRAL AIRLINES, INC., *et al.*, *Intervenors*.

Before WATERMAN and MOORE, *Circuit Judges*, and SMITH,
District Judge.

Petition to review various orders of the Civil Aeronautics Board imposing restrictions upon petitioner's effective certificate in the course of the Board's disposition of intervenors' timely-filed petitions for reconsideration. Orders set aside.

R. S. MAUREE, JAMES W. CALLISON (FRANK F. ROX, of
of counsel), Atlanta, Georgia, Legal Division, Delta
Air Lines, Inc., *for Petitioner*.

ROBERT A. BICKS, Acting Asst. Attorney General; Rich-
ard A. Solomon, Atty., Department of Justice; Frank-
lin M. Stone, General Counsel, Civil Aeronautics
Board; John H. Wanner, Deputy General Counsel;
O. D. Ozment, Assoc. General Counsel, Litigation and
Research; Morris Chertkov, Attorney, Civil Aero-
nautics Board, *for Respondent*.

ALBERT F. GRISARD, Washington, D. C., *for Intervenor*,
Lake Central Airlines, Inc.

WATERMAN, Circuit Judge:

Petitioner is a certificated trunk-line air carrier possessing routes that, in the main, run from the mid-west to the southeast quarter of the country. The present controversy arises out of the Board's area proceeding known as the "Great Lakes-Southeast Service Case." Other aspects of this same area proceeding were recently before this court in *Eastern Air Lines v. CAB*, 271 F. 2d 752 (2 Cir. 1959), *cert. denied*, 362 U.S. 970. For a general description of this "area proceeding" and for a statement of the air transportation the Board had under consideration in the "Great Lakes-Southeast Service Case" we refer to our opinion in *Eastern Air Lines v. CAB*, *supra*.

In its decision and order in the above area proceeding, Order No. E-13024 of September 30, 1958, the Board added six cities to Delta's pre-existing Route 54, which prior to that time served Chicago and Miami with certain intermediate points, but bypassed Indianapolis. The addition to Delta's authority of the three cities of Columbus, Toledo, and Detroit permitted Delta for the first time to offer service between Miami and Detroit, and for that reason this authority extension was important to the issues presented to this court in *Eastern Air Lines v. CAB*, *supra*, but it has no bearing on the question now before us. The addition of the three cities of Dayton, Louisville, and Indianapolis permitted Delta for the first time to offer service between these cities and the other cities which lay on its Route 54. Since Indianapolis already was an authorized intermediate point on Delta's Route 8 between New Orleans and Detroit, the inclusion of Indianapolis as an intermediate point on Route 54 had the additional effect, which the Board recognized and approved, of permitting Delta on the same flight, provided that the flight stopped at

Indianapolis, to serve cities on both of these routes.¹ By the Board's September 30 order Delta's new certificate, incorporating this additional authority, was to become effective on November 29, with the proviso that prior thereto the Board might extend that effective date upon its own initiative or upon a petition for reconsideration of the Board's September 30 order. The new certificates of other carriers who had received new authorizations under the "Great Lakes-Southeast Service" decision had the same effective date and were subject to the same proviso.

Numerous petitions for reconsideration were indeed filed. Included among these were petitions by Lake Central Airlines, Inc. and Piedmont Aviation, Inc., two local service carriers. The new route applications of all local service carriers had been excluded by the Board from the "Great Lakes-Southeast Service Case," the Board stating that it would consider them later in a separate proceeding. The local service carriers, however, were permitted to intervene to present evidence as to the effect that an award to a trunkline carrier might have upon the local service carriers' present or contemplated operations. In their petitions for reconsideration Lake Central and Piedmont sought, *inter alia*, to have restrictions imposed on Delta's service between ten pairs of cities² which, as a result of

¹ Unless the Board imposes "restrictions" a carrier may operate flights between any combination of authorized points on a given linear route. Similarly, absent restrictions, when two routes of a carrier have a common point, the carrier may operate flights between any combination of points on the two routes via the common point.

² The ten pairs of cities are:

Indianapolis, Ind.-Chicago, Ill.; Indianapolis, Ind.-Cincinnati, Ohio; Indianapolis, Ind.-Louisville, Ky.; Indianapolis, Ind.-Lexington, Ky.; Indianapolis, Ind.-Asheville, N. C.; Dayton, Ohio-Lexington, Ky.; Dayton, Ohio-Asheville, N. C.; Cincinnati, Ohio-Louisville, Ky.; Louisville, Ky.-Lexington, Ky.; Louisville, Ky.-Asheville, N. C.

the addition of Indianapolis, Louisville and Dayton to Route 54, Delta would be able to serve without restriction under the certificate authorized by the Board's September 30 decision. Lake Central's petition contained a request to stay the effective date of Delta's certificate. By order No. E-13190, dated November 21, the Board stayed the effectiveness of Delta's certificate for the period to and including December 6 for the convenience of this court in considering Eastern's request for a judicial stay. Two other certificates were also stayed for this reason. On November 28, 1958 the Board issued Order No. E-13211, which, with one exception,³ refused to stay the effective date of any new certificate beyond December 7. The Board assigned two interrelated reasons for its refusal to grant further stays. First, the Board found that the various reconsideration petitions did not make sufficient showings of probable legal error or abuse of discretion. Second, the Board wished to have the new services inaugurated in time for the peak period of winter travel. The Board's opinion in Order No. E-13211 closed with the statement that the order was not a disposition of the several petitions for reconsideration on their merits.⁴

On December 4 this court denied Eastern's request for a judicial stay, and, in recognition thereof, on December 5 the Board by Order No. E-13245 dissolved the stay imposed by Order No. E-13190. Accordingly, on December 5, 1958,

³ The exception was the certificate of Eastern Air Lines. Piedmont, in its petition for reconsideration, in addition to seeking to have restrictions imposed on Delta's service between the pairs of cities set forth in footnote 2, *supra*, sought to prevent the extension of Eastern's Route 6 from Charleston, W. Va. to Chicago. In its opinion accompanying Order No. E-13211, the Board held that Piedmont's objections to Eastern's additional authorization raised serious questions; and accordingly it stayed the effective date of Eastern's new certificate until further action by the Board.

⁴ The opinion stated: "Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits."

Delta's certificate became effective. On January 1, 1959, pursuant to schedules filed with the Board, Delta inaugurated service between Chicago and Indianapolis, with flights continuing beyond Indianapolis southward to Evansville, Indiana, a city Delta was authorized to service on its previously established Route 8.

On May 7, 1959 the Board issued the order here complained of, Order No. E-13835.⁵ This order constituted the Board's formal disposition of the various petitions for its reconsideration of the September 30, decision. This order modified the former decision. One modification was that restrictions were imposed on Delta's service between the ten pairs of cities set forth in footnote 2, *supra*, so that a Delta flight serving any of the pairs of cities was required to originate at Atlanta or at a point on Route 54 south thereof.⁶ One effect of the restrictions was to forbid the service Delta had inaugurated between Evansville and Chicago via Indianapolis unless that flight began at Atlanta and proceeded on a circuitous routing through Memphis.

The issue here is whether, on the above facts, the Board had power to alter Delta's certificate without resort to a modification proceeding under Section 401(g) of the Act, 49 U. S. C. 1371(g).⁷ It is the Board's contention that it

⁵ Delta's petition also encompasses Order No. E-14044 denying Delta's motion for a partial stay in order to permit the continuance of the Evansville-Indianapolis-Chicago service, and Order No. E-14224 denying Delta's petition for a stay pending judicial review.

⁶ The Board indicated that the advisability of these restrictions would be considered anew in the later local service carrier area proceeding.

⁷ Between the time of the Board's initial action and the modification on reconsideration, the Civil Aeronautics Act (52 Stat. 973, 49 U. S. C. 401), was supplanted by the Federal Aviation Act (72 Stat. 731, 49 U. S. C. 1301). The provisions of the former Act here involved were re-enacted without change, and there is admittedly no issue here stemming from the supplantation of the Civil Aeronautics Act.

may modify a certificate subsequent to the effective date of the certificate in the course of passing upon timely filed petitions for reconsideration of the award contained therein; and that the proceedings provided for in Section 401(g) only need to be followed after the Board has finally disposed of these petitions for reconsideration. We disagree.

Section 401(f), relating to the effective date and duration of an air carrier's certificate of public convenience and necessity provides as follows: "Each certificate shall be effective from the date specified therein, and *shall continue in effect until suspended or revoked as hereinafter provided . . .*" (Italics supplied.) The phrase "as hereinafter provided" would appear to require our rejection of the Board's argument that it has some form of implied power to alter the authority conferred in an effective certificate. Section 401(g) is the only section of the Act expressly dealing with the modification of certificates. The Board maintains that power to modify an effective certificate can be found in Section 204(a), 49 U. S. C. 1324(a), but this argument is almost identical to the position taken by the Interstate Commerce Commission in *United States v. Seatrain Lines*, 329 U. S. 424 (1947), and there rejected by the Supreme Court, *supra*, at pp. 432-33. This holding of the Supreme Court in *Seatrain* is likewise fully dispositive of any Board reliance upon Section 1005(d), 49 U. S. C. 1485(d) as express statutory support for its position.

Save for the exceptions in Section 401(f) set forth in footnote 8, *supra*, Sections 401(f) and 401(g) are patterned very closely upon Section 212(a) of Part II of the

* Section 401(f) states three exceptions, none here applicable, to the above rule. A certificate conferring temporary authority ceases to be effective upon the expiration of its term; a certificate will cease to be effective if the Board certifies that operations under the certificate have ceased; and if the carrier fails to inaugurate service authorized by a certificate within ninety days of the date of authorization, the Board upon notice and hearing may revoke the unused authority.

Interstate Commerce Act, 49 U. S. C. §312(a). In *Smith Bros., Revocation of Certificate*, 33 MCC 465, 472 (1942), the Interstate Commerce Commission in construing Section 212(a) announced the following principle: "We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited." The Board makes a futile effort to distinguish the *Smith Bros.* case on the ground that a revocation of a certificate is more closely circumscribed by statute than a certificate's modification. Under both Sections 212(a) of Part II of the Interstate Commerce Act and Section 401(g) of the Federal Aviation Act modification differs from revocation only as to the matters the Commission or Board must demonstrate *once a proper proceeding has been instituted*. The statutory requirement to institute a proceeding is the same whether the certificate is to be modified or revoked. The *Smith Bros.* case has been frequently cited with apparent approval in the Supreme Court and other federal courts. We follow it, believing its principle to be as applicable to the Federal Aviation Act as to Part II of the Interstate Commerce Act.

It is true that in cases involving motor carriers under Part II of the Interstate Commerce Act the Supreme Court has held that, under certain closely-defined circumstances, an effective certificate may be modified by the Commission without resort to a formal proceeding under Section 212(a). For instance, in *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U. S. 133, 146 (1958) the Supreme Court held that the Commission may so rectify "inadvertent ministerial errors." In the present case there is no suggestion that Delta's certificate inadvertently contained greater authority than the Board intended to confer by its September 30 order. Moreover, it is affirmatively clear that when the Board refused on November 28, 1958 to stay the effective

date of Delta's certificate it was fully aware of the arguments which subsequently led it on May 7, 1959 to impose the restrictions here complained of.⁹ Indeed, for this reason, the present case is similar to *Watson Bros. Transp. Co. v. United States*, 132 F. Supp. 905 (D. Neb. 1955), *aff'd*, 350 U. S. 927 (1956), where the three-judge district court concluded on the facts present there that the modification of a motor carrier's certificate had resulted from a change in administrative policy, and therefore held that the change was beyond the Interstate Commerce Commission's power. In any event, the present case is clearly distinguishable from the case of *United States v. Rock Island Motor Transit Co.*, 340 U. S. 419 (71 S. Ct. 382) (1951), *rehearing denied*, 341 U. S. 906, where the Supreme Court held that the Commission had power, apart from a proceeding under Section 212(a), to impose specific restrictions to implement an already existing but somewhat generally-phrased restriction on the type of service the carrier was certificated to perform. We are of the opinion that the imposition of a restriction on service under a certificate that previously had authorized the service without any restriction presents an entirely different matter than that before the Court in *Rock Island Motor Transit*.

The Board, seeking to justify its act here on the basis of past performance, informs us that, in the past, upon a petition for rehearing, it has modified a certificate it had allowed to become effective.¹⁰ However, on at least one other occasion it expressed grave doubt as to its statutory power to do so. *Kansas City-Memphis-Florida Case*, 9 CAB 401, 408-09 (1948). Moreover, the Board has represented to at least one court that it has been its practice to stay the effective date of a certificate in order to permit it time to consider the merits of reconsideration petitions. *Southwest*

⁹ See footnote 3, *supra*.

¹⁰ *Cincinnati-New York Additional Service*, 8 CAB 603, 604 (1947) seems to be the clearest example.

Airways v. CAB, 196 F. 2d 937, 938 (9 Cir. 1952).¹¹ We do not find that the Board in this particular can rely upon a consistent administrative interpretation of its statutory powers similar to the consistent interpretation found in *United States v. Leslie Salt Co.*, 350 U. S. 38: 396 (1956).

Finally, the Board argues that unless we uphold its position that resort to 401(g) of the Act is unnecessary it will be confronted with a dilemma in the management of its large-scale area proceedings. In its brief the Board states: "Moreover, Delta's concept, if adopted, would be prejudicial both to the traveling public and the carriers, for in some cases it could only result either in a hasty and largely meaningless passing on reconsideration requests of a highly technical economic nature, or the further postponement of the effective dates of certificates with the attendant deprivation of needed public service and additional carrier revenues, on the small chance that a further review will result in a change of the original decision." We admit the Board's dilemma is real¹² but we find that this dilemma is inherent

¹¹ *Western Air Lines v. CAB*, 194 F. 2d 211 (9 Cir. 1952) involved a Board procedure entirely different from that in the present case. In *Western Air Lines* the Board, subsequent to the effective date of its order approving the transfer of a certificate, imposed labor protective conditions upon the transfer. The Board's power relative to the transfer of certificates is governed by Section 401(h), 49 U. S. C. § 1371(h) rather than Sections 401(f) and 401(g). Under Part II of the Interstate Commerce Act, the Supreme Court has stated that the Commission's power to amend an order approving the transfer of a certificate is more flexible than its power to amend a certificate. *United States v. Rock Island Motor Transit Co.*, 340 U. S. 419, 445-46 (1951), rehearing denied, 341 U. S. 906. In addition, *Western Air Lines* involved misrepresentation in testimony before the Board. There is language in *Smith Bros., Revocation of Certificate*, 33 MCC 465 (1942) indicating that if a certificate has been obtained as a result of misrepresentation it may be revoked without a formal proceeding under Section 212(a), 49 U. S. C. § 312(a).

¹² We suggest, however, that the Board investigate the possibility of issuing some form of temporary authorization.

in the statutory scheme of Sections 401(f) and 401(g). It is our view that once a certificate has become effective, the Act requires that the Board resort to more formal—even though possibly more time-consuming—procedures to modify such a certificate, irrespective of whether the modification is entirely in the public interest.

Our holding is not based upon the fact that, prior to the date on which the certificate was modified, Delta inaugurated service authorized by the certificate. Furthermore, we have accepted, *arguendo*, the Board's argument that the language in the order quoted in footnote 4, *supra*, put Delta on notice that the Board purported to reserve to itself power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration.

We hold that under Sections 401(f) and 401(g) of the Federal Aviation Act, absent fraud, misrepresentation or clerical error in the original issuance of the certificate, it is only in a proceeding satisfying the requirements of Section 401(g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions.

Orders No. E-13835, E-14044, and E-14224 are set aside, to the extent that they impose restrictions on the certificate of Delta Air Lines, Inc., which became effective on December 5, 1958.

11a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

October Term, 1959

No. 248

DELTA AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

LAKE CENTRAL AIRLINES, INC., *et al., Intervenors.*

Judgment and Decree

This cause having come on for hearing on the transcript of the record from the Civil Aeronautics Board, and the Court, upon consideration of the record, briefs and arguments of Counsel, having filed its opinion herein on June 29, 1960, it is

ORDERED, ADJUDGED AND DECREED that the orders of the Civil Aeronautics Board of which review is sought in this case be, and they hereby are, set aside to the extent that they impose restrictions on the certificate of Delta Air Lines, Inc., which became effective on December 5, 1958.

/s/ SPERRY R. WATERMAN

/s/ LEONARD T. MOORE

U. S. Circuit Judges

/s/ JOSEPH SMITH

U. S. District Judge

Dated: July 21, 1960

A true copy,

A. DANIEL FUSARO, *Clerk*

by NEILL F. O'DONERTY, *Chief Deputy Clerk*

FILE COPY

Office Supreme Court, U.S.

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JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC.,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

**BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC.,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

**BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

Delta Air Lines, Inc. ("Delta"), the Petitioner below, prays that this Court will deny the Petition for Writ of Certiorari filed in No. 493 by Lake Central Airlines, Inc. ("Lake Central"). The Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered in *Delta Air Lines, Inc., v. Civil Aeronautics Board* (2d Cir. 1960), 280 F.2d 43.¹

¹ Citations to the Opinion below will be to Appendix A of the Petition in No. 493, e.g., "(App. A, pp. 1a-10a)." References to material in the printed Joint Appendices will be by page number thereof, preceded either by the symbol "J.A." or by the symbol "A.J.A." The symbol "J.A." refers to the white-covered, three-volume Joint Appendix filed in Case No. 25,422, etc., in the Court below, and by stipulation made part of the record in this case. The symbol, "A.J.A." refers to the blue-covered, single-volume Additional Joint Appendix filed with the Court below in the instant case, No. 25,852.

COUNTERSTATEMENT OF THE FACTS

This case involves an administrative proceeding before the Civil Aeronautics Board (the "CAB" or the "Board"), known as the *Great Lakes-Southeast Service Case*. That proceeding was concerned with the air service needs of an area extending between the Great Lakes and Florida. Only applications by so-called trunkline carriers were consolidated, as noted in Lake Central's Petition, but no restrictions were imposed which in any way limited the right of the applicants to seek both long-haul rights and rights to provide more short-haul types of service between intermediate cities in the area under consideration (CAB Orders E-9734, J.A. 78a *et seq.*, and E-10043, J.A. 111a *et seq.*).

In its decision (CAB Order E-13024 of September 30, 1958, J.A. 1313a), the CAB added six cities to Delta's existing Route 54, which prior to that time served Chicago and Miami with certain intermediate points, but by-passed Indianapolis. The addition of three of those cities,¹ Dayton, Louisville, and Indianapolis, permitted Delta for the first time to offer service between them and cities in the Southeast and Florida, and also between them and certain other, more nearby points already served by Route 54. Since Indianapolis already was an authorized intermediate point on another Delta Route—Route 8—between New Orleans and Detroit, inclusion of Indianapolis as an intermediate point on Route 54 had the additional effect, which the Board recognized and approved (E-13024, J.A. 1323a, 1346a-1347a), of permitting Delta to serve cities on *both* of these routes on the *same* flights, provided that the flights stopped at the "route junction point" of Indianapolis.

¹ The addition to Delta's authority of the other three cities, Columbus, Toledo and Detroit, which permitted Delta for the first time to offer service between the Southeast and those cities, has no bearing on the question presented in this case.

Although, as Lake Central's Petition states at page 5, the CAB imposed restrictions on a number of new certifications granted to other applicants in order to protect existing local service carrier operations, *none* of these restrictions were imposed upon the certifications made to Delta.¹ No restrictions of any kind were imposed upon Delta's new Dayton, Louisville, and Indianapolis authorities.

By the Board's September 30 order, Delta's new certificate, incorporating this additional authority, was to become effective sixty days thereafter on November 29, with the proviso that *prior* thereto the Board might extend that effective date upon its own initiative or in recognition of a timely-filed petition for reconsideration of the order (J.A. 1384a). The certificates of other carriers who had received new authorizations in the *Great Lakes-Southeast Case* had the same effective date and were subject to the same proviso (J.A. 1379a, 1388a, 1394a and 1400a).

Petitions for reconsideration were in fact filed. One of them was filed by Lake Central, as noted at page 5 of that carrier's Petition to this Court. Lake Central sought, *inter alia*, to have restrictions imposed on Delta's service between four pairs of cities which, as the result of the addition of Indianapolis and Louisville to Route 54, Delta was enabled to serve without restriction under the certificate authorized by the Board's September 30 decision.²

¹ The restrictions which were imposed upon Delta (E-13024, J.A. 1355a-1356a), were all imposed for other reasons not here pertinent.

² Lake Central's Petition to this Court mentions only the Chicago-Indianapolis and Indianapolis-Cincinnati markets which Delta was authorized to serve as a result of the addition of Indianapolis to Route 54 between the already certificated points of Chicago and Cincinnati (Petition, p. 5). The other two markets originally mentioned by Lake Central were Indianapolis-Louisville and Cincinnati-Louisville.

Although Lake Central's Petition to this Court does not mention the fact, that carrier also requested the CAB to maintain the *status quo* in the event the CAB could not dispose of Lake Central's petition for reconsideration before November 29, 1960, because:

"The amended certificate for route No. 54 issued to Delta pursuant to Order No. E-13024 will become effective on November 29, 1958, unless such effective date is extended by the Board . . ." (Lake Central Petition for Reconsideration, A.J.A. 1592a-1592a).

On November 28, 1958, the CAB issued its Order E-13211 (J.A. 1469a *et seq.*) which, with one exception, *refused to stay the effective date of any new certificate*, thus denying Lake Central's plea for stay of the Delta certificate. The Board assigned two interrelated reasons for its refusal to grant the requested stays. First, after reviewing the various petitions for reconsideration, the Board found that they did not make sufficient showing of probable legal error or abuse of discretion, except in the one exception already mentioned, to justify such a stay. Second, the Board stated that it wished to have the new services inaugurated in time for the peak period of winter travel (J.A. 1470a-1471a). As the Petition herein notes (p. 6), Order E-13211 then closed with the statement that it was not a disposition of the several petitions for reconsideration on their merits (J.A. 1495a-1496a).

The one exception where a stay was granted involved new authority which had been awarded to Eastern Air Lines. Piedmont Aviation, Inc. (another local service carrier) sought to overturn an extension which had been granted of Eastern's Route 6 from Charleston, West Virginia, to Chicago. In its opinion accompanying Order E-13211, the Board found that Piedmont's objection to this additional Eastern authorization *did* raise serious questions; and it was for that reason that the Eastern

certificate's effective date was stayed until further action could be taken by the Board (J.A. 1493a-1494a).

For reasons not relevant here, Delta's new certificate actually became effective on December 5, 1958, rather than upon November 29, 1958 (see A.J.A. 1593a-1595a). On January 1, 1959, pursuant to schedules filed with the Board, Delta inaugurated service under the new certificate between Chicago and Indianapolis, with flights continuing beyond Indianapolis southward to Evansville, Indiana, a city which Delta was authorized to service on its previously-established Route 8, and shortly thereafter also inaugurated service between Louisville and Indianapolis, services which would not have been permitted under the restrictions which had been requested by Lake Central.¹

On May 7, 1959, over five months after Delta's new, unrestricted authority became fully effective, and four months after Delta inaugurated new services pursuant to schedules filed with the Board, the Board issued the order of which complaint was made in the Court below (E-13835, J.A. 1509 *et seq.*). This order purported to constitute the Board's formal disposition of the various petitions for reconsideration of the September 30 decision which had not been disposed of when the certificate was allowed to become effective. The order did in fact modify the former decision, one modification being the imposition upon Delta of the restrictions requested by Lake Central, so that a Delta flight serving any of the four pairs of cities mentioned in Lake Central's reconsideration request was thereafter required to originate at Atlanta or at a point on Route 54 south thereof. One effect of the restrictions was to render illegal the service which Delta already had inaugurated in good faith between Evansville and Chicago via Indianapolis, and between Indianapolis and Louisville.

¹ By informal agreement with the CAB, Delta has refrained from inaugurating additional service in these ten markets (except such as would be permitted even if the restrictions were imposed), pending resolution of this proceeding.

Lake Central speaks at page 4 of its Petition to this Court about its previously-existing authority between Chicago and Indianapolis and between Indianapolis and Cincinnati. The fact is, however, that the restrictions which the CAB purported to impose upon Delta were not designed to protect any existing authority held by Lake Central, but rather related only to authority which Lake Central hoped to obtain in another, pending proceeding (see Order E-13835, J.A. 1511a-1512a).

Upon Petition by Delta the Court below stayed the effectiveness of Order E-13835 and, in its later decision, found that the Board was without power to impose the additional restrictions upon Delta's certificate by means of reconsideration after the certificate had become effective.

Lake Central was admitted in the proceeding below as an Intervenor, although the carrier did not file a brief with the Second Circuit.

ARGUMENT

Lake Central presents what appear to be two different grounds for seeking review by this Court, namely, (a) that the decision below conflicts with the decision of this Court in *United States v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947) and with decisions by other Courts of Appeals, thus giving an erroneous construction to the language of Sections 401(f)¹ and 401(g)² of the Federal Aviation Act³

¹ 72 Stat. 754, 49 U.S.C. 1371(f).

² 72 Stat. 754, 49 U.S.C. 1371(g).

³ 72 Stat. 731, 49 U.S.C. 1301. Between the time of the Board's initial action and the modification on reconsideration, the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401) was supplanted by the Federal Aviation Act. The provisions of the former Act here involved were re-enacted without change, and there ad-

(Petition, pp. 9-11); and (b) that the decision below will cause confusion as to the point in time at which the Board's "authority" to reconsider its decisions and orders terminates (Petition, p. 11). Delta will show that neither of these grounds contains any substance which justifies burdening this Court with review of the Second Circuit Decision.

It will be shown that the decision below is in full accord with the *Seatrain* decision and, indeed, with a long line of decisions by this Court, other Circuits, and administrative agencies; that the Court's construction of the pertinent Federal Aviation Act provisions was eminently correct; and that the decision below has eliminated, rather than created, confusion as to the proper time for termination of the administrative process in new airline route cases. Lake Central just disagrees with the conclusion of the Court below; but such disagreement forms no basis for issuance of a Writ of Certiorari. As this Court said in *Magnum Import Company v. De Spoturno Coty*, 262 U.S. 159, 163 (1923);

"The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ . . ." (Emphasis added)¹

mittedly is no issue stemming from the supplantation of the Civil Aeronautics Act.

¹ Although the *Magnum* case was decided before the amendments made by the Judiciary Act of 1925, the force of the above-quoted

I. The Decision Below Is in Full Accord With the *Seatrain* Decision, and With Other Decisions by This and Other Courts, and Therefore Properly Construes the Federal Aviation Act.

When reduced to its essence the decision below is merely this: Because the CAB is a creature of Congress, its "powers are purely statutory,"¹ and it therefore can act only "... as specifically authorized by Congress."² The foregoing quotations are from the *Seatrain* case, with which Lake Central contends the decision below conflicts. But rather than departing from the principles laid down in *Seatrain*, a case which involved a situation quite analogous to the one here involved (App. A to Lake Central's Petition, p. 6a), the Second Circuit rather applied the well-settled law of that case to the clear and unambiguous language of Sections 401(f) and 401(g) of the Federal Aviation Act. The decision below merely rejects, as did *Seatrain*, an agency attempt to read into its organic statute a power which Congress explicitly chose not to grant—a power which would create an implied exception to a limitation which Congress clearly *did* impose.

The limitation which Congress imposed is upon the CAB's power to modify certificates once they are granted. Congress specified in Section 401(f) that:

language has not been vitiated. The essence of the Act of 1925 was curtailment of this Court's appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions (*Ex Parte Republic of Peru*, 318 U.S. 578, 600 (1943)). Furthermore, the quoted language from *Magnum* has been cited with approval within just the past few years, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

¹ *Seatrain Lines, Inc. v. United States*, 64 F. Supp. 156, 160 (D.C. Del. 1946), *aff'd*, 329 U.S. 424 (1947).

² *United States v. Seatrain Lines, Inc.*, 329 U.S. 424, 433 (1947).

"Each certificate shall be effective *from the date specified therein*, and shall continue in effect until suspended or revoked as *hereinafter* provided . . ." (Emphasis added).

And as the Court below held—a holding which Lake Central does not contest—the next succeeding Section, Section 401(g), is the only provision in the Act which expressly deals with modification of effective certificates (App. A to Lake Central's Petition, p. 6a). Section 401(g) admittedly was not followed here.

The exception to this Congressionally-prescribed procedure for which Lake Central contends is evident in its complaint that the Court below has read the Act "so as to make Sections 401(f) and 401(g) applicable merely upon the technically effective date of the certificate, even though timely petitions for reconsideration of the award of amended certificate authority have been received and are still pending the Board's decision" (Petition, pp. 8-9). The Court below, of course, did not "make" those Sections applicable upon such a date; it merely gave effect to the fact that Congress, in the above quoted language, provided that that is how the Sections would take effect. Lake Central, therefore, is objecting to the Court's refusal to read into the unqualified language of Sections 401(f)¹ and 401(g) an *implied* exception to cover situations where the CAB has left petitions for reconsideration pending on the effective date specified in the certificate to which the petitions are directed.

¹ Although Section 401(f) does state three exceptions to its rule as to the inviolability of certificates after the effective dates specified therein, none of them are applicable here: a certificate conferring temporary authority ceases to be effective upon the expiration of its term; a certificate will cease to be effective if the Board certifies that operations under the certificate have ceased; and if the carrier fails to inaugurate service authorized by a certificate within ninety days of authorization, the Board upon notice and hearing may revoke the unused authority (see App. A to Petition, p. 6a).

As will be seen, there is no basis upon which any such exception can be founded. It might first be noted, however, that whereas Lake Central implies that the decision below will make reconsideration of CAB decisions difficult, the implication is not at all true. Lake Central's argument rather is an attempt to amend the Statute on the basis of administrative expediency—an attempt to give the CAB more time for the reconsideration process whether or not a certificate has gone into effect. Affirmance of such a position, of course, would destroy the chief aim of Congress in providing for certificates in the first place—to give the carriers route security (*Lea*, 83 Cong. Rec. 6407 [1938]). In any event, the Statute as now written gives the CAB all the time needed to reconsider decisions without impairing the value of certificates once made effective.

Thus, the CAB now has three courses of action open to it, each of which would be in full accord with the law: (a) to act on petitions for reconsideration within the sixty-day grace period before certificate effectiveness for which new certificates invariably provide (see *e.g.*, J.A. 1379a, 1384a, 1394a, and 1400a); (b) to allow for a longer grace period than sixty days in new certificates in any instance where the complexity of the proceeding indicates that reconsideration might involve protracted consideration of difficult issues; or (c) to further extend (stay) the effective date of a new certificate if, as the end of the originally-specified grace period is approached, it appears that additional time will be needed for reconsideration. Any one of these steps will provide for full completion of the administrative process *without* departure from the Statute as written and without violation of the certificate holder's rights to due process.

Furthermore, none of these three courses of action will unduly impede the administrative process. This is evident from the fact, to be explained below, that hereto-

fore the CAB has consistently followed steps (a) and (c) as outlined above, with no discernible adverse effect upon its discharge of the responsibilities imposed upon it by Congress.¹ This case, therefore, does not have to be approached, and it was not approached by the Court below, on the basis that denial of the position urged by Lake Central will curtail administrative freedom.

Lake Central is unable to point to any specific language in Section 401(f), Section 401(g) or elsewhere in the Statute which states the implied exception for which it contends—or, indeed, which even mentions reconsideration of certificates under any circumstances. Lake Central does, however, point to the language underscored in the following quotation from this Court's opinion in *Seatrains*, *supra*, 329 U.S. 424 at 432-433 (Petition, p. 11):

“... The certificate, when finally granted *and the time fixed for rehearing it has passed*, is not subject to revocation in whole or in part except as specifically authorized by Congress . . .” (Emphasis added).

The underscored language, however, is inapplicable in a proceeding under the Federal Aviation Act.

The quoted language was concerned with a certificate issued under the Water Carrier Act.² Contrary to the Federal Aviation Act, that Act does not specify the date upon which a certificate shall become effective, nor does it lay down a procedure for modifying a certificate once issued (see *United States v. Seatrain Lines, Inc.*, *supra*, 329 U.S. at 430). Moreover,—again contrary to the Federal Aviation Act—the Water Carrier Act *does* contain elaborate provisions with respect to rehearing, reargu-

¹ For a discussion of the fact that the law as applied by the Court below will not mean frustration of the administrative process, see *Ryan, Revocation of an Airline Certificate*, 15 *Journal of Air Law and Commerce*, pp. 377-389, at 389 (1948). The author is a former chairman of the Civil Aeronautics Board.

² 54 Stat. 929 *et seq.*, 49 U.S.C. 901 *et seq.*

ment, and reconsideration of agency decisions, orders, and requirements.¹ These two factors account for the Court's reference to the passing of "the time fixed for rehearing."

The only possible provisions in the Federal Aviation Act, however, upon which Lake Central can be relying are those in Sections 204(a) and 1005(d) which allow the Board, except as otherwise provided in the Statute, to "amend", "modify" or "suspend" its "orders."² Because this broad and general language is the only thing in the Federal Aviation Act which even approaches provision for reconsideration of CAB actions, it is clear that it cannot modify the *specific* language of Sections 401(f) and 401(g) which, unlike the Water Carrier Act provisions, do prescribe with precision when a certificate shall become effective and do carefully outline the procedure thereafter to be followed in the event that it is desired to consider the possible revision of an effective certificate.

In any event, the very case—*United States v. Seatrain Lines, supra*—upon which Lake Central relies, makes it clear that such broad language as that contained in Sections 204(a) and 1005(d), referring to "orders", cannot be used to create a power to reconsider effective certificates. The *Seatrain* case rejected a similar argument. In that case, the Interstate Commerce Commission relied upon substantially identical language in the Water Carrier Act in attempting to create for itself a power which Congress had not specifically granted to modify certificates. This Court held (329 U.S. at 432):

"Nor do we think that the Commission's ruling was justified by the language of Sec. 315(c), 49 USCA

¹ Section 316(a) of that Act, 54 Stat. 946, 49 U.S.C. 916(a) incorporating Section 17(6) of the Interstate Commerce Act, '24 Stat. 385, 49 U.S.C. 17(6).

² 72 Stat. 743, 49 U.S.C. 1324(a), and 72 Stat. 794, 49 U.S.C. 1485(d), respectively, set out in the Appendix hereto.

Sec. 915(c), 10A FCA title 49, Sec. 915(c), which authorizes it to 'suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.' *That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used in the Act.* Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word 'order.' Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word 'certificate.' . . . It is clear that the 'orders' referred to in 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. *But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding . . ."* (Emphasis Added).

As noted earlier, this Court went on to hold that *certificates* can be modified only in the manner specifically authorized by Congress.¹

Thus, rather than providing support for Lake Central's present attempt to create an implied exception to Section 401(f), the *Seatrains* case clearly supports the contrary ruling of the Court below.

The *Seatrains* Case was not the first time, nor the last, that in analogous situations it has been decreed that an

¹ Application of this Court's interpretation in the *Seatrains* case of the Interstate Commerce Act provisions to the similar language of Section 1005(d) of the Federal Aviation Act is reinforced by the very next Section of the latter Statute, Section 1005(e), 72 Stat. 794, 49 U.S.C. 1485(e). In that Section Congress specifically mentioned "certificates" separately from "orders", implying clearly that the two terms cannot be read as having the same meaning. Section 1005(d) mentions only "orders."

agency must follow procedures specifically prescribed by Congress, and not attempt by inference to create for itself other powers not expressly conferred. Thus, in *Seatrain*, this Court cited an earlier decision by the Interstate Commerce Commission under the language of Section 212(a) of the Motor Carrier Act,¹ which Section is substantially similar in content to Section 401(f) and 401(g) of the Federal Aviation Act. As this Court put it:

"... in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in Section 212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Re Smith Bros. Revocation of Order*, 33 MCC(F) 465" (329 U.S. 429, at 430-431).

As the Interstate Commerce Commission had put it in the *Smith Bros* case itself:

"... We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefore appears and until all controversy is determined, but *once a certificate, duly and regularly issued, becomes effective our authority to terminate it is expressly marked off and limited*. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated but *the certificate marks the end of the proceeding*, just as the entry of a final judgment or decree marks the end of a court proceeding..." (Emphasis Added).

In exact accord, see *Hergott v. Nebraska State Ry. Commission*, 15 N.W. 2d 418, (Neb. 1944).

One of the more important decisions decided since the *Seatrain* case is *Watson Bros. Transportation Company v. United States*, 132 F. Supp. 905 (D. Neb. 1955), affirmed by this Court, 350 U.S. 927, (1956). A three-judge Dis-

¹ 49 Stat. 555, 49 U.S.C. 312(a).

trict Court in that case ruled, under those provisions of the Motor Carrier Act which are similar to Sections 401 (f) and 401(g) of the Federal Aviation Act, that:

"... The only statutory authority for the suspension, change, or revocation of such a certificate by the Commission is contained in Section 212(a) . . .

"... Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212(a), it is invalid.

"... the order . . . is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued" (132 F. Supp. 905 at 909).

In the *Watson* case there was a deliberate attempt by the Interstate Commerce Commission to implement a change of heart through modification, without notice and hearing, of a previously-effective certificate.

Except for the fact that no petition for reconsideration had been filed (the Commission acted upon its own motion), the *Watson Case* is on all fours with this one. As the Court below found (App. A to Petition herein, pp. 7a-8a)—findings which are not contested by Lake Central—in this case there is no suggestion of inadvertent error, no suggestion that at the time it was put into effect Delta's certificate mistakenly contained greater authority than the Board intended to confer by its earlier decision granting the certificate. The Court further found it to be "affirmatively clear" that when the CAB refused, just prior to the certificate's effective date, to extend that date as Lake Central had requested in order to permit reconsideration, the CAB was fully aware of the arguments which subsequently led it on May 7, 1959 (five months after the certificate became effective, and four months after Delta had inaugurated service under that certificate) to impose the restrictions of which Delta complains.

The fact is, therefore, that in the interim the CAB changed its policy, an arbitrary—or at least unilateral—

administrative decision which did not and could not invest the CAB with authority to modify an effective certificate without adherence to Section 401(f) and 401(g) procedures, *United States v. Watson Bros. Transportation Company, Inc.*, *supra*; *American Trucking Associations, Inc. et al. v. Frisco Transportation Company*, 358 U.S. 133, 181 (1958). The Board's actions were all taken deliberately and, like the Interstate Commerce Commission action involved in *Watson*, constitute an invalid attempt, contrary to specific statutory limitations, to change a certificate duly issued.

Lake Central refers to "prior uncontested actions" by the agency (Petition, p. 9) where the CAB allegedly has amended certificates on reconsideration after their effective dates (Petition, p. 7). It is interesting to note that Lake Central cites the Court to no examples of this alleged past course of conduct. The fact is, however that to the best of Delta's knowledge, the agency previously has done so on only the four occasions out of the hundreds and hundreds of cases decided by the CAB, which are cited in footnote 7 on p. 10 of the related Petition of the CAB in No. 492.¹ These four examples in truth are scattered *exceptions* to the CAB's *consistent* and *contrary* course of conduct ever since 1948—a course of conduct which clearly has constituted recognition by the CAB of its *lack* of power to reconsider an effective certificate. In its *Kansas City-Memphis-Florida Case*, 9 C.A.B. 401 (1948), the CAB said:

"... We have grave doubt, however, as to our possession of such power ..." (9 C.A.B. 401 at 408-409).

¹ Although the CAB cites five examples in said footnote, one of them, *United-Western. Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950), "involved a Board procedure entirely different from that in the present case" (App. A to Lake Central Petition, p. 9a, ftn. 11).

In view of this doubt, the agency went on to announce that:

"... in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case" (*ibid.*).

Since rendering this decision, the CAB consistently has made a new certificate effective sufficiently long after the decision date, usually sixty days (as in this case), to permit reconsideration if requested, and has conditioned even such an advance effective date upon a power reserved unto itself to extend the date further if necessary to allow additional study of petitions for reconsideration. Moreover, in cases decided before this one, the CAB repeatedly has used this power to postpone the effective date of certificates during reconsideration. (The cases are collected at pages 29-32 of Delta's Brief, and at pages 9-12 of Delta's Reply Brief, to the Court below.)

Indeed, as the Second Circuit found (App. A to Lake Central's Petition, pp. 8a-9a), the CAB even has represented to at least one court that it has been the agency's practice heretofore to stay the effective date of a certificate in order to permit it time to consider the merits of petitions for reconsideration, *Southwest Airways v. Civil Aeronautics Board* (9th Cir. 1952), 196 F. 2d 937, 938. Moreover, just this past week, the CAB issued an order in another proceeding (the *Great Lake's Local Service Investigation*, C.A.B. Docket 4251 *et al.*), in which the CAB again recognized that unless it stays the effective date of certificates until it can dispose of petitions for reconsideration, it will lose the power to do so. Except for the actual ordering language staying the effectiveness of the new certificates there involved, that order in its entirety reads as follows:

"Various petitions for reconsideration of the Board's decision in the above-entitled proceeding (Order E-15695, dated August 25, 1960) have been filed and it appears that the Board's consideration of these petitions will not be completed until after November 8, 1960, the date presently fixed for making effective the amended certificates issued as part of the Board's decision herein. In order to preserve the status quo until the Board has had adequate opportunity to dispose of the aforementioned petitions, we find that it is in the public interest to stay the effectiveness of the certificates in question" (Order E-15995, November 4, 1960).

In view of this consistent past practice by the CAB, it is difficult to believe, as Lake Central now alleges, that it "did not seek judicial stay of the effective date of . . . [Delta's] . . . amended certificate" (Petition, p. 7) when the CAB put Delta's certificate into effect without first disposing of Lake Central's petition for reconsideration, because the carrier believed the Board had been following a different practice (*ibid.*). Indeed, the very fact that in its petition to the CAB for reconsideration Lake Central stated that "the amended certificate . . . will become effective on November 29, 1958, unless such effective date is extended by the Board . . ." (A.J.A. 1591a-1592a) and for that reason requested an administrative stay of the certificate's effective date beyond November 29, 1958, in the event the Board could not by then dispose of the petition for reconsideration (*ibid.*), shows that Lake Central in fact assumed that the CAB was without power to reconsider a certificate after it had taken effect.

Lake Central argues that if the court below is not reversed, Lake Central will be compelled to institute a new proceeding before the Board seeking the amendment of Delta's certificate (Petition, p. 9). Lake Central apparently means that it might request the CAB to institute a Section 401(g) proceeding. As the carrier's argument recognizes, Congress has provided in Section 401(g) for

such modification proceedings. All that the Court below has held is that the CAB must adhere to these specified procedures and not create new procedures of its own because it thinks some other method is better than the one ordained by Congress. And that also is the essence of this Court's holding in *Seatrain, supra*. The decision below comports fully with the rationale of the *Seatrain* case and does not, as Lake Central contends, fail to give proper recognition to that decision.

Lake Central also would find a conflict between the Second Circuit decision and two decisions of other United States Courts of Appeals, *Frontier Airlines, Inc. v. Civil Aeronautics Board* (D.C. Cir. 1958), 259 F. 2d 808, and *Waterman Steamship Corp. v. Civil Aeronautics Board* (5th Cir. 1947), 159 F. 2d 828, *rev'd other grounds*, 333 U.S. 103 (1948). The allegation is wrong.

In point of fact there could be no conflict between the Circuits because this is the first time that the question here involved has been raised and specifically decided in a case involving the Federal Aviation Act or its predecessor, the Civil Aeronautics Act.¹ While a somewhat similar question, among many other unrelated questions, was raised in *Frontier, supra*, that case did not involve the precise same issue raised here concerning diminution of the complainant's effective authority on reconsideration. More important, perhaps, the Court in *Frontier* did not purport to rule upon any related issue; in this respect it merely decided a question as to the CAB's power to act upon petitions for reconsideration—and even then only with the Court's approval—after a petition for judicial review had been filed.

The Court in *Waterman* was not even confronted with the issue raised here. That case concerned only the time-

¹ 52 Stat. 977, *et seq.*, 49 U.S.C. 401 *et seq.*

liness of a petition for review. ~~No action had been taken by the CAB on reconsideration which changed its original decision.~~

Clearly, the decision of the Court below is fully consistent with the decision of this Court in *United States v. Seatrain Lines, Inc.*, *supra*; is not inconsistent with a decision of any other Court of Appeals; and properly construes the provisions of the Federal Aviation Act in conformity with a long line of judicial and administrative decisions.

II. The Decision Below In No Manner Will Cause Confusion as to the Time at Which the Board's "Authority" to Reconsider Its Decisions and Orders Terminates.

Lake Central concludes its argument by making the strange statement (Petition, p. 11) that:

"... If this conflict is not resolved, in ... [Lake Central's] ... opinion the way will be opened for a deluge of filings seeking premature judicial stays of Board orders because of the confusion created by the decision below and the parties' inability to determine at what point the Board's authority to reconsider its own decisions and orders terminates ..."

The statement is absurd; if one thing now is clear, it is when the Board's "authority" to reconsider a certificate-awarding decision terminates, namely, as of the effective date of the certificate. There had not been any question about this matter for years, because Congress had so clearly stated the applicable rule in Sections 401(f) and 401(g), until the Board arbitrarily departed in this case from its past, consistent adherence to the provisions of those Sections. It was this sudden departure by the CAB which has created the confusion; and it is the decision of the Court below which again rights the matter.

The Board is given no specific statutory power of reconsideration. As a result, in the case of certificates of public

convenience and necessity, the Board must reconsider the underlying decision, if at all, *before* the certificate is allowed to go into effect because Congress *has* stated that "*Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided . . .*" (Section 401[f]). All the Court below did was tell the Board to follow this clear Congressional mandate. No possible confusion will result.

CONCLUSION

For the foregoing reasons, Delta Air Lines, Inc., respectfully submits that a Writ of Certiorari should not issue in No. 493.

Respectfully submitted,

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November 19, 1960

APPENDIX A

Statutes and Regulations Involved

- I. *Federal Aviation Act of 1958*, 72 Stat. 737 *et seq.*,
49 U.S.C. 1301 *et seq.*

A. *Section 204(a)*

GENERAL AUTHORITY

"The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act."

(72 Stat. 743, 49 U.S.C. 1324[a])

B. *Section 401(f)*

EFFECTIVE DATE AND DURATION OF
CERTIFICATE

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided . . ."

(72 Stat. 754, 49 U.S.C. 1371[f])

C. *Section 401(g)*

AUTHORITY TO MODIFY, SUSPEND,
OR REVOKE

"The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public con-

venience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

(72 Stat. 754, 49 U.S.C. 1371[g])

D. Section 1005(d)

**SUSPENSION OR MODIFICATION OF
ORDER**

"Except as otherwise provided in this Act, the Administrator or the Board is empowered to suspend or modify their orders upon such notice and in such manner as they shall deem proper."

(72 Stat. 794, 49 U.S.C. 1485[d])

E. Section 1005(e)

COMPLIANCE WITH ORDER REQUIRED

"It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the . . . Board under this Act affecting such persons so long as the same shall remain in effect."

(72 Stat. 794, 49 U.S.C. 1485[e])

II. *Interstate Commerce Act*, 24 Stat. 379, as amended,
49 U.S.C. 1 *et seq.*

A. *Sections 17(6), 17(7) and 17(8)*

REHEARING, REARGUMENT, OR
RECONSIDERATION OF DECISIONS,
ORDERS AND REQUIREMENTS

"(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for reconsideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this

paragraph, any application for rehearing, reargument or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing."

REVERSAL OR MODIFICATION AFTER REHEARING, ETC.

"(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order."

STAY OF DECISIONS, ETC., NOT EFFECTIVE AT TIME OF APPLICATION FOR REHEARING, ETC.

"(8) Where application for rehearing, reargument, or reconsideration of a decision, order or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision,

order, or requirement has not yet become effective, the decision, order or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division, but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

(24 Stat. 385, as amended, 49 U.S.C. 17(6), (7) and (8))

III. *Motor Carrier Act* (Part II of Interstate Commerce Act), 49 Stat. 543, as amended, 49 U.S.C. 301 *et seq.*

A. *Section 212(a)*

SUSPENSION, CHANGE, REVOCATION AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

"Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: . . ."

(49 Stat. 555, as amended, 49 U.S.C. 312[a])

IV. *Water Carrier Act* (Part III of Interstate Commerce Act), 54 Stat. 929, 49 U.S.C.A. 901 *et seq.*

A. *Section 316(a)*

"The provisions of section 17 . . . of this title shall apply with full force and effect in the administration and enforcement of this chapter."

(54 Stat. 946, 49 U.S.C. 916[a])

V. *Regulations of the Civil Aeronautics Board*, 14 C.F.R. 302.1 *et seq.*

A. *Rule 37*

"(a) *Time for Filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within twenty (20) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. . . ."

(14 C.F.R. 302.37)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC., *Petitioner*

v.

DELTA AIR LINES, INC., *Respondent*

(On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit)

**REPLY BRIEF FOR PETITIONER.
LAKE CENTRAL AIRLINES, INC.**

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Subsequent to the filing of the petitions for a writ of certiorari in this and a related case (*Civil Aeronautics Board, Petitioner, v. Delta Air Lines, Inc.*, No. 492), the United States Court of Appeals for the District of Columbia Circuit entered its decision in *Truman Outland, et al., Petitioners, v. Civil Aero-*

navitics Board, No. 15489, decided October 27, 1960.¹ The Court there expressly disagreed with the decision of the Ninth Circuit in *Consolidated Flowers Shipments v. Civil Aeronautics Board*, 205 F. 2d 449, which held that a timely petition for reconsideration does not toll the 60-day statutory limit² for seeking judicial review. The Court of Appeals for the District of Columbia Circuit concluded in *Outland* that the time for seeking review runs from the time the Board enters its order denying petitions for reconsideration.³ That

¹ This decision has not been reported; references herein to pages of the Court's opinion refer to the slip opinion.

² Title 49, U. S. C. § 1486(a).

³ Page 7. The Court's full discussion of this question was as follows:

"We shall treat first the question of timely filing of the petition for review because of its importance to orderly and efficient conduct of the Board's affairs. Both petitioner and the Board contend that a petition for judicial review of a Board order may be filed within 60 days after denial of a timely petition for reconsideration of the initial order. Title 49, U.S.C. § 1486(a) provides 'any order . . . issued by the Board . . . shall be subject to review . . . upon petition, filed within sixty days after the entry of such order' The Board calls attention to *Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board*, 205 F.2d 449 (9th Cir. 1953), which held that a timely petition for reconsideration does not toll the 60 day statutory limit for seeking judicial review, but the Board's brief urges that 'Consolidated Flower was erroneously decided' and urges this court not to follow it.

In *State Airlines, Inc. v. Civil Aeronautics Board*, 84 U.S. App. D.C. 374, 174 F.2d 510 (1949), we reached the merits of a petition for review in circumstances where review would have been denied for want of a timely petition under the dictates of *Consolidated Flower, supra*. Prior to the Administrative Procedure Act we held, in *Braniff Airways, Inc. v. Civil Aeronautics Board*, 79 U.S. App. D.C. 341, 147 F.2d 152 (1945) that a petition for review was timely if filed within 60 days of denial of the motion for rehearing stating

decision necessarily indicates that the Board's jurisdiction to modify or amend its order and any certificate issued thereby is retained until the Board has finally acted upon pending petitions for reconsideration.⁴ The *Outland* decision controverts Respondent's contention that a proceeding terminates, insofar as the Civil Aeronautics Board is concerned, when the certificates issued become effective, even though the Board has not completed its action upon timely petitions for reconsideration.

'we cannot review an order until administrative remedies have been exhausted.' *Id.* at 342, 147 F.2d at 153. See also *North Central Airlines, Inc. v. Civil Aeronautics Board*, 105 U.S. App. D.C. 207, 265 F.2d 581, cert. denied, 360 U.S. 903 (1959), and *Waterman S.S. Corp. v. Civil Aeronautics Board*, 159 F.2d 828 (5th Cir. 1947), rev'd on other grounds sub nom. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

Thus, while we have *sub silentio* indicated, since the passage of the Administrative Procedure Act, that a timely petition for reconsideration tolls the 60 day period for filing a petition for judicial review, we yield to the Board's urging to declare unequivocally what we have heretofore implied. With deference to the Ninth Circuit, which has held otherwise, we join the Fifth Circuit, *Waterman S.S. Corp. v. Civil Aeronautics Board*, *supra*, and affirmatively declare our conclusion to the contrary. Cf. *Skowhegan Sav. Bank v. Securities and Exchange Commission*, 91 U.S. App. D.C. 388, 201 F.2d 702 (1952). The legislative history of 5 U.S.C. § 1009(c) indicates that it was adopted to achieve harmony with the holding in *Levers v. Anderson*, 326 U.S. 219 (1945) to the effect that a motion for rehearing was not necessary to exhaust administrative remedies. However, while making judicial review available without a motion for rehearing, that statute did not operate to repeal the law with respect to finality. Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied, as we said in *Braniff Airways*,

⁴ While *Outland* itself did not involve the grant of a certificate, nonetheless the authorities relied upon by the Court of Appeals in reaching the above conclusion were all certificate cases.

Thus, as previously indicated, there is a square conflict between the Ninth and the District of Columbia Circuits as to whether the Board retains jurisdiction over a proceeding until it finally disposes of petitions for reconsideration. This conflict constitutes an additional reason for granting the petitions in Nos. 492 and 493.

Petitioner is at a loss to understand Respondent's position as expressed in its brief in view of the undisputed fact that Respondent itself has heretofore contended before the Board that the certificate which the Board issued Respondent in this same proceeding could legally be modified in response to Respondent's own petition for reconsideration for the *removal* of a restriction imposed by the initial award, notwithstanding the fact the effective date of such award had passed. Several months after Respondent's certificate had become effective and while its petition for recon-

Inc. v. Civil Aeronautics Board, supra. Section 1009 (c) does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon. The contrary result reached by the Ninth Circuit has caused parties to file so called 'protective' petitions for judicial review while petitions for rehearing before the Board were pending. A whole train of unnecessary consequences flowed from this; the Board and other parties may be called upon to respond and oppose the motion for review; when the Board acts, the petition for judicial review must be amended to bring the petition up to date.

We hold that when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the Board."

sideration seeking modification thereof was still pending, Respondent in another Board proceeding was relying upon the Board's power to grant the requested modification in an effort to ward off a grant to another carrier. Upon being reminded of this by Petitioner in its answer to Respondent's request to the Board for a stay of the order here under review, Respondent replied that there was a difference between a grant of *additional authority* (i.e., through the removal of a restriction, which removal was opposed by other parties) and the taking away of authority first granted. (A.J.A. 1602a-1604a)

Respectfully submitted,

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Dated November 25, 1960

FILED

DEC 1 1960

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC.,
Petitioner,
v.
DELTA AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

REPLY OF DELTA AIR LINES INC. TO REPLY OF
LAKE CENTRAL AIR LINES INC.

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On Petition for a Writ of Certiorari to the United States
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**REPLY OF DELTA AIR LINES INC. TO REPLY OF
LAKE CENTRAL AIR LINES INC.**

Delta Air Lines, Inc., ("Delta"), hereby responds to the Reply Brief filed in No. 493, by Lake Central Airlines, Inc. ("Lake Central") and prays that this Court will deny the Petition for Writ of Certiorari.

I.

In its Reply (p. 4) to Delta's Brief in Opposition, Lake Central in part relies for the first time upon a conflict between the Ninth and the District of Columbia Circuits in *Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board* (9th Cir. 1953), 205 F. 2d 449 and *Outland*

et al. v. Civil Aeronautics Board (D.C. Cir. 1960), No. 15,489, decided October 27, 1960, but not yet reported. The alleged conflict does in fact exist. *But its existence is completely irrelevant here.*

Both of the cited cases involved a question which is totally distinct from the one raised in this proceeding. Those two cases concerned a question of procedure—what is the proper time for seeking judicial review of a Civil Aeronautics Board (“CAB” or the “Board”) decision—whereas this case is concerned with a substantive question respecting the CAB’s basic statutory power.¹

Moreover, as the Court noted in the *Outland* decision, the conflict between jurisdictions on the procedural problem involved in that case has existed for years, with the Ninth Circuit standing alone (see *Lake Central Reply*, pp. 2-3). The conflict has created no practical problem. *Outland* neither changed the law nor created the conflict. The situation, therefore, is the same now as it was when *Lake Central* filed its Petition in this proceeding *without* citing or relying upon the existence of the irrelevant conflict between Circuits over the separate and different procedural problem.

Finally, neither *Lake Central’s* Petition in No. 493 nor the related Petition of the CAB in No. 492, seek to bring before this Court either the *Consolidated Flowers* or *Outland* case, or the problems resolved in those cases.

¹ The D. C. Circuit in the *Outland* decision “joins” the 5th Circuit in *Waterman v. Civil Aeronautics Board* (5th Cir. 1947), 159 F. 2d 828, *rev’d on other grounds sub nom. Chicago and Southern Airlines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103 (1948), in rejecting the position of the 9th Circuit in the *Consolidated Flowers Case* (*Lake Central Reply*, p. 3). The *Waterman* case was cited by *Lake Central* in its Petition, and *Delta* already has distinguished it from the present proceeding (*Delta’s Brief in Opposition*, pp. 19-20). Clearly, then, on the irrelevant procedural point *Outland* is merely cumulative, and adds nothing to *Lake Central’s* cause.

For all of the foregoing reasons, Lake Central cannot seek support for its Petition here in the unrelated conflict between those two cases.

II.

Lake Central now also relies upon an alleged conflict between *Outland* and the decision below. As already seen, however, the two cases involve wholly *different* questions, with the result that no actual conflict even could exist.

Lake Central cites the District of Columbia Circuit's language in *Outland*, that when a petition for rehearing is in fact filed with the CAB "... there is no final action until the rehearing is denied" (Lake Central Reply, p. 3). This, Lake Central contends, "controverts" a Delta contention supposedly approved in this case by the Court below, to the effect that a proceeding terminates when the new certificates issued in that proceeding become effective. The error with this argument is that the foregoing is *not* a Delta contention; Lake Central apparently does not understand either Delta's position or the ruling of the Court below.

The decision below has no bearing whatsoever upon the agency's power to commence or terminate a proceeding as it deems best—nor, we might add, upon its power to fix and thereafter extend the effective date of a new certificate as desired. The decision below *does* hold—because Congress decreed that it shall be so—that once the CAB does make a new certificate effective, the agency thereupon loses power to withdraw any part of that particular certificate except by following procedures laid down in the statute by Congress. But this holding does not mean that the administrative proceeding itself is thereby terminated.¹

¹ For example, as was requested in various of the petitions for reconsideration involving the agency proceeding below in

More important, perhaps, insofar as its consistency with the *Outland* case is concerned, the decision below has no bearing whatever upon the time for appeal of a CAB decision, nor does it in any manner affect either the power of an appropriate Court to act on appeal or the power of the agency to fulfill any judicial mandate which may issue. The decision below merely enforces particular limitations which Congress has imposed upon the CAB's power to withdraw certificate authority after a certificate has gone into effect.

Conversely, the decision in *Outland* with respect to the proper time for a party to file for judicial review in a situation where petitions for reconsideration are still pending before the agency, in no manner turns upon or even discusses the statutory limitations which are involved in this case concerning the agency's basic powers.

The two cases clearly are not in conflict either in result or in reasoning. The decision below does rule that under the provisions of the statute, once a new certificate has become effective the agency is allowed to act only in a certain manner upon pending petitions for reconsideration which are addressed to those portions of the agency decision which granted that new certificate; but the time at which such action is to be taken is still within the agency's control, and the agency therefore still determines the proper time for an appeal to the Courts under the procedural rules laid down in *Outland*. To repeat, *Outland* merely deals with questions of procedure, while the decision below rules upon an entirely separate problem respecting the substantive power of the agency. There is not, and could not be, any conflict between *Outland* and this case.

this case, after a new certificate's effective date the Board still could grant additional new certificate authority in the same proceeding, to the same airline or to other parties, for which provision was not made in the original opinion.

III.

One other aspect of Lake Central's Reply must be answered. Without citation or quotation, the carrier states (Reply, pp. 4-5) that prior to the time Delta filed the petition for review in this case, Delta had taken an inconsistent position in another proceeding before the CAB with respect to the agency's power to "reconsider" an effective certificate. In that other proceeding, Lake Central alleges, Delta "relied" upon the CAB's power to grant Delta additional authority over and above that contained in the certificate which had been issued to Delta in this proceeding, which additional authority Delta had requested in a petition of its own for reconsideration of the agency's original decision. Lake Central contends that this "reliance" took place "several months" after Delta's certificate had become effective. Delta must point out that these assertions do *not* reveal the "undisputed fact," that Lake Central flatly alleges (Reply, p. 4), but to the contrary *are grossly misleading*.

As Lake Central itself points out, Delta's petition to the agency for reconsideration requested *new* authority which up to that time had been withheld—an entirely different situation than the one involved here, where a petition requested *withdrawal* of permanent, effective, and *already implemented* route authority. But aside from that fact, and as Lake Central well knows, Delta's citation, in the other administrative proceedings, to Delta's petition for reconsideration in this case was directed to establishing Delta's long-standing interest in the provision of service in the market to which the petition and the other proceeding were both addressed, and no argument was made concerning the Board's power to act on petitions after certificates have become effective.

Lake Central's attempt to spin an inconsistency out of such a situation shows the lengths to which the carrier

is forced to go in an effort to construct alleged conflict and to obtain another hearing concerning the issues *properly* resolved in the decision of the Court below.

IV.

For the reasons set forth above and in its Brief in Opposition, Delta Air Lines, Inc., respectfully submits that a Writ of Certiorari should not issue.

Respectfully submitted,

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December 1, 1960

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416-10-11

JAMES P. BROWN, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, Inc., *Petitioner*

v.

DELTA AIR LINES, Inc., *Respondent*

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Petitioner, an intervenor below, respectfully requests that the Court, upon review of the decision of the United States Court of Appeals for the Second Circuit pursuant to certiorari ordered December 12, 1960 (R. 108), reverse said decision and reinstate the effectiveness of the orders of the Civil Aeronautics Board, set aside by the court below, to the extent that said orders imposed restrictions on the certificate of Delta Air Lines, Inc. for its Route 54.

OPINIONS BELOW

The opinions and orders of the Civil Aeronautics Board are unreported. They are reproduced at pages 11-88 and 94-98 of the transcript of record herein. The opinion of the United States Court of Appeals for the Second Circuit is reported at 280 F. 2d 43 and reproduced at R. 98-107.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 21, 1960 (R. 107). Petitioner filed its petition for a writ of certiorari to said court on October 19, 1960, invoking the jurisdiction of this Court under 49 U.S.C. 1486(f) and 28 U.S.C. 1254. The Court allowed certiorari by its Order entered December 12, 1960 (R. 108) and, at the same time, granted a similar petition for writ of certiorari to the same court filed by the Civil Aeronautics Board and arising from the same judgment (*Civil Aeronautics Board v. Delta Air Lines, Inc.*, October Term 1960, No. 492). (R. 108)

QUESTION PRESENTED

Whether the Civil Aeronautics Board, once it has entered an order permitting a certificate of public convenience and necessity to become effective, is without power thereafter, in the same proceeding and upon the same record, to modify the certificates in response to a timely petition for reconsideration filed prior to the effective date, where the Board's order expressly reserved the right to make such modification.

STATUTE INVOLVED

Consideration of this case involves Sections 401(f) and 401(g) of the Federal Aviation Act of 1958 [72 Stat. 755-56, 49 U.S.C. 1371(f) and (g)], which provide:

EFFECTIVE DATE AND DURATION OF CERTIFICATE

(f) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be

revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

STATEMENT OF THE CASE

The Civil Aeronautics Board ("Board") on May 25, 1955 instituted a proceeding to consider the applications of certain air carriers for service in an area between the Great Lakes and southeast United States, later identified as the "Great Lakes-Southeast Service Case". Petitioner is an air carrier certificated by the Civil Aeronautics Board to engage in so-called local, or short-haul, air transportation in the Great Lakes area over Route No. 88. The Board denied motions for the consolidation of local air carrier applications in the above proceeding, finding that the proceeding involved "predominantly" long-haul services and that the interests of any local service carrier, i.e., Petitioner, which might be adversely affected would be adequately protected by granting such local service carrier leave to intervene and, where overlapping applications were involved, to urge the mutual exclusivity of the respective trunkline and local carrier proposals.¹

Insofar as is relevant to this petition, Petitioner's certificate of public convenience and necessity for Route No. 88 authorizes it to operate between Chicago,

¹ R. 5-6.

Illinois and Indianapolis, Indiana, via one or more intermediate points and between Indianapolis and Cincinnati, Ohio.² The Board consolidated in the proceeding before it an application of Delta Air Lines, Inc. ("Delta") which sought, *inter alia*, the addition of Indianapolis as an intermediate point on Delta's existing Route 54 between Cincinnati and Chicago.

Petitioner participated fully as an intervenor in every stage of the proceeding before the Board's Hearing Examiner and the Board and introduced evidence to show the diversion of its existing and future traffic revenues which would result from the certification of another carrier in the Chicago-Indianapolis and Indianapolis-Cincinnati markets unless such newly authorized services were subject to certain so-called long-haul restrictions. In the case of Respondent, Petitioner urged that such restriction should require that carrier to originate or terminate all of its flights which served both Chicago and Indianapolis, or both Indianapolis and Cincinnati, at Atlanta, Georgia, or a point south thereof.

The Board's original opinion and order were issued on September 30, 1958³ and, among other things, granted Respondent authority to serve the Chicago-Indianapolis and Indianapolis-Cincinnati markets without, however, being subject to the long-haul restriction which Petitioner had urged the Board to impose on any such authorizations. The Board did impose a similar restriction on other awards in order to protect Petitioner's traffic. Petitioner filed a petition

² Petitioner has for several years operated nonstop service between Indianapolis and Cincinnati, a distance of 98 miles, pursuant to exemption authority received from the Board.

³ R. 11-56.

reconsideration of the Board's original opinion and order within the time permitted by the Board's rules of Practice⁴ and prior to the effective date of the amended certificate issued to Respondent, and renewed its request for the imposition of a long-haul restriction on Respondent's Chicago-Indianapolis and Indianapolis-Cincinnati services. The amended certificate issued to Respondent by the Board's opinion and order of September 30, 1958 was to become effective November 29, 1958.⁵ (For reasons not relevant here, its effective date was extended to December 6, 1958.)⁶

On November 28, 1958, the Board issued its opinion and order disposing of the petitions for reconsideration to the extent that such petitions requested stay of the Board's order of September 30, 1958.⁷ The Board stated that "because of the detailed matters raised in the petitions for reconsideration, it will not be possible to finally dispose of them until after November 29. * * * An order disposing of the petitions for reconsideration in full will be issued at a later date."⁸ The Board's opinion made it clear that the Board desired the new Florida services which it had indicated to be put into effect immediately during the 1958-1959 season, stating, "We are of the opinion that these services should be put into operation at the advent of peak winter season in order to give the traveling public the full advantage thereof. * * * We will afford the traveling public the advantages

88-93.

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of the new services we have found required immediately during the 1958-1959 season."⁹ Among the new Florida services certificated were those of Respondent from Detroit, Toledo, Columbus and Dayton to Florida. Respondent filed an answer objecting to the stay of its amended Florida service authority.¹⁰ The Board's opinion and order concluded as follows:¹¹

In the interim, the Board will address itself to the merits of the petitions for reconsideration, and our order dealing with these matters will issue at a later date. To the extent that we have considered the petitions for reconsideration in the present order we have done so only for the purposes of assessing the probability of error in our original decision. We feel that such action is necessary to a fair consideration of the stay requests, and is in no way prejudicial to the legal rights of those parties seeking reconsideration. *Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits.* (Emphasis supplied)

Inasmuch as the Board in the past had, in response to timely filed petitions for reconsideration, amended or modified certificates after their effective dates,¹² Petitioner did not seek judicial stay of the effective date of Respondent's amended certificate.

⁹ R. 59.

¹⁰ R. 58, fn. 2.

¹¹ R. 79-80.

¹² See, e.g., *North Central Case*, 8 C.A.B. 208 (1947); *Cincinnati-New York Additional Service*, 8 C.A.B. 603 (1947); *United-Western, Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950); *Service to Phoenix Case*, Order No. E-12039 (1957); *South Central Area Local Service Case*, Order E-14219 (1959).

On May 7, 1959 the Board adopted and issued its Second Supplemental Opinion and Order on Reconsideration¹³ which, among other things, amended Respondent's certificate of public convenience and necessity, as effective December 5, 1958, to require that Respondent's flights serving Chicago and Indianapolis, and Indianapolis and Cincinnati should originate or terminate at Atlanta or a point south thereof. Respondent thereafter sought review of the Board's orders in the United States Court of Appeals for the Second Circuit. Similar amendments of the effective certificates of Eastern Air Lines, Inc. and Capital Airlines, Inc. made by the Board's supplemental opinion and order of May 7, 1959 and an earlier order in response to timely-filed petitions for reconsideration, in order to protect the traffic of other local service carriers, were not judicially questioned by either Eastern or Capital.

Petitioner was admitted as an intervenor in the cause below and supported the action of the Board on reconsideration as well as the Board's authority to take such action.

The Court below reversed the Board's decision of May 7, 1959 and set aside the Board's order attached thereto, finding that:

... under Section 401(f) and 401(g) of the Federal Aviation Act, absent fraud, misrepresentation or clerical error in the original issuance of the certificate, it is only in a proceeding satisfying the requirements of Section 401(g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions.¹⁴

¹³ R. 81-88.

¹⁴ R. 107.

In so ruling, the Court accepted the Board's contention that the language referred to in footnote 11, *supra*, put Respondent on notice that the Board "purported to reserve to itself the power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration."¹⁵

ARGUMENT

The decision below is erroneous and results from both a misconstruction of the Federal Aviation Act and a failure of the court below to give proper recognition to the decision of this Court in *United States v. Seatrain Lines*, 329 U.S. 424 (1947).

The court below has read the Act so as to make Sections 401(f) and 401(g) applicable merely upon the technically effective date of the certificate, even though timely petitions for reconsideration of the award of amended certificate authority have been received and are still pending the Board's decision. Such reconsideration as was sought by Petitioner was based upon the identical record on which the Board's amended award to Respondent was founded. If the holding of the court below is not reversed, Petitioner will be compelled to institute a new proceeding before the Board, bear the considerable expense of making another record which in large part will be duplicative of the portions of the prior record upon which its petition relied, and in the meantime be subject to diversion of its local traffic between the pairs of points in question until the Board's decision in the new proceeding is issued. The Board will likewise be put to considerable expense and trouble, all because of the overly-technical reading given Sections 401(f) and 401(g) by the court below.

¹⁵ R. 106.

Petitioner believes that such sections, properly construed in the light of the Board's prior uncontested actions and the relevant decisions of other courts, relate only to a certificate which has become final in the sense that the Board has lost all further power to deal with such certificate in the same proceeding in which it was issued. Certainly, an award which is the subject of timely filed petitions for reconsideration does not possess the degree of finality which would be the case had no petitions for reconsideration been filed. Where such petitions are still pending upon the "effective date" of the award, petitioner urges that the effect is to keep the proceeding alive until the Board has finally disposed of all such petitions.

In *Waterman Steamship Corp. v. Civil Aeronautics Board*, 159 F. 2d 828 (1947), reversed on other grounds, 333 U.S. 103, the Fifth Circuit held that a petition for reconsideration "operated to retain the Board's authority over the order" (159 F. 2d at p. 829).

In *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C. 1958), the contention was made that the Board erred in failing to postpone the effective date of various certificates until after disposition of petitions for reconsideration, in that the Board was without power to grant any relief on reconsideration in relation to an effective certificate. An additional argument was made that the Board was also impotent to act because of the filing of the petition for judicial review—a point not present here. The court disposed of these contentions with the following findings:

We do not find the order denying reconsideration invalid because rendered after this petition was filed. No harm was done. Had the Board been of

a mind to grant reconsideration, it could have so indicated and a motion to remand would have been in order. (at p. 811)

The same court in *Truman Outland, et al. v. Civil Aeronautics Board*, 284 F. 2d 224 (October 27, 1960) expressly disagreed with the decision of the Ninth Circuit in *Consolidated Flower Shipments v. Civil Aeronautics Board*, 205 F. 2d 449, which held that a timely petition for reconsideration does not toll the 60-day statutory limit¹⁶ for seeking judicial review. The Court of Appeals for the District of Columbia Circuit concluded in *Outland* that the time for seeking review runs from the time the Board enters its order denying petitions for reconsideration.¹⁷ That decision

¹⁶ Title 49, U.S.C. § 1486(a).

¹⁷ 284 F. 2d, at 227. The Court's full discussion of this question was as follows:

We shall treat first the question of timely filing of the petition for review because of its importance to orderly and efficient conduct of the Board's affairs. Both petitioner and the Board contend that a petition for judicial review of a Board order may be filed within 60 days after denial of a timely petition for reconsideration of the initial order. Title 49, U.S.C. § 1486(a) provides "any order . . . issued by the Board, . . . shall be subject to review . . . upon petition, filed within sixty days after the entry of such order" The Board calls attention to *Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board*, 205 F. 2d 449 (9th Cir. 1953), which held that a timely petition for reconsideration does not toll the 60 day statutory limit for seeking judicial review, but the Board's brief urges that "Consolidated Flower was erroneously decided" and urges this court not to follow it.

In *State Airlines, Inc. v. Civil Aeronautics Board*, 84 U.S. App. D.C. 374, 174 F. 2d 510 (1949), we reached the merits of a petition for review in circumstances where review would have been denied for want of a timely petition under the dictates of *Consolidated Flower, supra*. Prior to the Admin-

necessarily indicates that the Board's jurisdiction to modify or amend its order and any certificate issued thereby is retained until the Board has finally acted upon pending petitions for reconsideration.¹⁸

Thus, there is a square conflict between the Ninth and the District of Columbia Circuits as to whether the Board retains jurisdiction over a proceeding until it finally disposes of petitions for reconsideration.

In the Administrative Procedure Act we held, in *Braniff Airways, Inc. v. Civil Aeronautics Board*, 79 U.S. App. D.C. 341, 147 F. 2d 152 (1945) that a petition for review was timely if filed within 60 days of denial of the motion for rehearing stating "we cannot review an order until administrative remedies have been exhausted." *Id.* at 342, 147 F. 2d at 153. See also *North Central Airlines, Inc. v. Civil Aeronautics Board*, 105 U.S. App. D.C. 207, 265 F. 2d 581, cert. denied, 360 U.S. 903 (1959), and *Waterman S.S. Corp. v. Civil Aeronautics Board*, 159 F. 2d 828 (5th Cir. 1947), rev'd on other grounds sub nom. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

Thus, while we have *sub silentio* indicated, since the passage of the Administrative Procedure Act, that a timely petition for reconsideration tolls the 60 day period for filing a petition for judicial review, we yield to the Board's urging to declare unequivocally what we have heretofore implied. With deference to the Ninth Circuit, which has held otherwise, we join the Fifth Circuit, *Waterman S.S. Corp. v. Civil Aeronautics Board*, *supra*, and affirmatively declare our conclusion to the contrary. Cf. *Skowhegan Sav. Bank v. Securities and Exchange Commission*, 91 U.S. App. D.C. 388, 201 F. 2d 702 (1952). The legislative history of 5 U.S.C. § 1009(c) indicates that it was adopted to achieve harmony with the holding in *Levers v. Anderson*, 326 U.S. 219 (1945) to the effect that a motion for rehearing was not necessary to exhaust administrative remedies. However, while making judicial review available without a motion for rehearing, that statute did not

¹⁸ While *Outland* itself did not involve the grant of a certificate, nonetheless the authorities relied upon by the Court of Appeals in reaching the above conclusion were all certificate cases.

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The *Seatrain* case involved a situation in which the Interstate Commerce Commission, some eighteen months after the time for seeking reconsideration had elapsed, *on its own motion* reopened an award because of a change in Commission policy. There, the focus was upon the fact that a significant period of time had elapsed since the Commission had *finally* disposed of the proceeding. In holding that the Commission could not reopen the award, this Court stated:

The certificate, when finally granted *and the time fixed for rehearing it has passed*, is not subject to revocation in whole or in part except as specifically authorized by Congress. (pp. 432-33, emphasis added)

operate to repeal the law with respect to finally. *Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied*, as we said in *Braniff Airways, Inc. v. Civil Aeronautics Board*, *supra*. Section 1009 (c) does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon. The contrary result reached by the Ninth Circuit has caused parties to file so called "protective" petitions for judicial review while petitions for rehearing before the Board were pending. A whole train of unnecessary consequences flowed from this: the Board and other parties may be called upon to respond and oppose the motion for review; when the Board acts, the petition for judicial review must be amended to bring the petition up to date.

We hold that when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the Board. (284 F. 2d at 226-228; emphasis added.)

Thus, the Court significantly recognized that if the time for rehearing had not passed (as it very clearly had not in the present case), it would have had no objection to the reopening ordered by the Commission.

CONCLUSION

The decision below is erroneous and conflicts with the decisions of this Court and two other circuits. If this conflict is not resolved, in Petitioner's opinion, there will follow a deluge of filings seeking premature judicial stays of Board orders because of the confusion created by the decision below and the parties' inability to determine at what point the Board's authority to reconsider its own decisions and orders terminates. The decision below should be reversed and those portions of the Board's orders set aside by the court below should be reinstated.

Respectfully submitted,

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Dated: March 17, 1961

SUPREME COURT OF THE UNITED STATES

Nos. 492 AND 493.—OCTOBER TERM, 1960.

Civil Aeronautics Board, Petitioner,

492

v.

Delta Air Lines, Inc.

Lake Central Airlines, Inc.,

Petitioner,

493

v.

Delta Air Lines, Inc.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1961.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case concerns the power of the Civil Aeronautics Board to alter a certificate of public convenience and necessity, granted to respondent Delta Air Lines, after that certificate had become effective under § 401 (f) of the Federal Aviation Act. 72 Stat. 755, 49 U. S. C. § 1371 (f).¹ The administrative proceedings from which the present dispute arises date back to May 1955, and

¹ This section provides:

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service."

involve consideration by the Board of a number of applications for new service between cities located in an area extending from the Great Lakes to Florida. The Board divided the proceedings into two general categories, consolidating the applications for long-haul service in the *Great Lakes-Southeast Service Case* and those for short-haul flights in the *Great Lakes Local Service Investigation Case*. In order to protect fully the interests of local service carriers, the Board allowed these carriers, including petitioner Lake Central Airlines, to intervene in the hearings on the long-haul applications.

At the conclusion of the *Great Lakes-Southeast Service Case* a number of awards were made, including one permitting Delta to extend an existing route northwest so as to provide service from Miami to Detroit and to add Indianapolis and Louisville as intermediate points on its existing Chicago-to-Miami route. Certain restrictions for the protection of local carriers were imposed on many of the awards, these restrictions generally providing that flights between specified intermediate cities had to originate at or beyond given distant points. The stated purpose of these restrictions was to prevent the long-haul carrier from duplicating so-called "turn-around" service already provided by existing local carriers. One such restriction was applied to Delta's run between Detroit and various locations in Ohio but, by and large, Delta's award was free of protective limitations.

The Board's order issued on September 30, 1958, and it specified that Delta's certificate was to become effective on November 29, 1958, unless postponed by the Board prior to that date. Shortly thereafter, within time limits set by the Board,² numerous petitions for reconsideration

² The Board's regulations concerning petitions for reconsideration, 14 CFR § 302.37, provide in part that:

"Petition for reconsideration—(a) *Time for filing*. A petition for reconsideration, rehearing or reargument may be filed by any party to

were filed, including one by Lake Central protesting the breadth of Delta's certificate. Lake Central requested that, if the Board should be unable to decide its petition for reconsideration before November 29, the effective date of the certificate be put off. On November 28, one day before Delta's certificate was to become effective, the Board issued a lengthy memorandum and order, which stated in substance that the requests for stays, with one immaterial exception, were denied, but that judgment on the merits of the petitions for reconsideration would be reserved. The Board explained that the parties had not made a sufficient showing of error to justify postponements and that, in view of the advent of the peak winter season, further delay would be particularly inappropriate; the Board then said:

"To the extent that we have considered the petitions for reconsideration in the present order we have done so only for the purposes of assessing the probability of error in our original decision. We feel that such action is necessary to a fair consideration of the stay requests, and is in no way prejudicial to the legal rights of those parties seeking reconsideration. Nothing in the present order forecloses the Board

a proceeding within thirty (30) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. After the expiration of the period of filing a petition, a motion for leave to file such petition may be filed; but no such motion shall be granted except on a showing of unusual and exceptional circumstances, constituting good cause for failure to make timely filing. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition."

from full and complete consideration of the pending petitions for reconsideration on their merits."

For reasons not presently pertinent, Delta's certificate became effective on December 5,³ rather than November 29, 1958, and Delta commenced its newly authorized operations shortly thereafter. On May 7, 1959, the Board issued a new order disposing of the still-pending petitions for reconsideration. By this order, the Board amended Delta's certificate in response to the restrictions proposed by Lake Central. Specifically, the Board barred Delta's operations between ten pairs of intermediate cities unless the flights initiated at Atlanta or points farther south; the effect of this order was to bar certain flights Delta was then operating. Even then, the Board's action was not final; the Board reserved the power to lift these restrictions pending the outcome of the *Great Lakes Local Service Case*.⁴ The Board's disposition of the petitions was taken summarily, without formal notice to the parties or the opportunity for a hearing prior to decision.

Delta sought review of this order before the Board, challenging the Board's power to change the terms of its certificate after the effective date thereof without notice or hearing. The Board overruled Delta's objection stating that: "[W]e believe we have such power, and we have exercised it in the past. Moreover, there is no showing, and we are unable to conclude, that any significant adverse

³ A temporary stay was granted from November 29 to December 5 to enable the Court of Appeals to consider a request by Eastern Air Lines for a judicial stay of certain awards made in the original proceeding. Eastern did not get its stay nor was its challenge on the merits upheld. *Eastern Air Lines v. Civil Aeronautics Board*, 271 F. 2d 752.

⁴ We are informed that this case has now been completed but no further action has been taken on Delta's restrictions.

effect will result to either Delta or the public from observance of the conditions here involved." On review in the Court of Appeals for the Second Circuit, however, the Board's order was overturned, the court reasoning that Congress had made notice and hearing a prerequisite to the exercise of the Board's power to change an existing certificate. *Delta Air Lines, Inc., v. Civil Aeronautics Board*, 280 F. 2d 43.

The issue in this case is narrow and can be stated briefly: Has Congress authorized the Board to alter, without formal notice or hearing, a certificate of public convenience and necessity once that certificate has gone into effect? If not, should it make any difference that the Board has purported to reserve jurisdiction prior to certification to make summary modifications pursuant to petitions for reconsideration? We think that both these questions must be answered in the negative.

Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other.³ Since these policies are in tension, it is necessary

³ See Tobias, Administrative Reconsideration: Some Recent Developments in New York, 28 N. Y. U. L. Rev. 1262, where the author observed:

"Re-examination and reconsideration are among the normal processes of intelligent living. Admittedly no warranty of correctness or fitness attaches to a decision or an action simply because it is a thing of the past. Every-day experience teaches the contrary: while the choice first made may well remain the course ultimately followed, often enough it is found on further consideration to require revision. On the other hand, constant re-examination and endless vacillation may become ludicrous, self-defeating, and even oppressive. Whether for better or for worse so far as the merits of the chosen course are

to reach a compromise in each case and petitioners have argued at length that the Board's present procedure is a happy resolution of conflicting interests. However, the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do. See *United States v. Seatrain Lines*, 329 U. S. 424, 433. Cf. *Delta Airlines v. Summerfield*, 347 U. S. 74, 79-80. This proposition becomes clear beyond question when it is noted that Congress has been anything but inattentive to this issue in the acts governing the various administrative agencies. A review of these statutes reveals a wide variety of detailed provisions concerning reconsideration, each one enacted in an attempt to tailor the agency's discretion to the particular problems in the area.⁶ In this

concerned, a point may be reached at which the die needs to be cast with some 'finality.' An opposition may thus develop between the right result and the final one."

See also the statement of the Board in its original opinion in this case, denying a motion to reopen the record:

"Our general policy with respect to motions to reopen the record for receipt of data on the most recent operating experience has consistently reflected the requirement of the public interest that the record in major route cases be brought to a close as expeditiously possible, consistent with the requirements of full hearings, so that a final decision may be rendered promptly. Institution of needed new services could be endlessly delayed were we to permit the record to be reopened in the final procedural stages of a case for the submission of more recent operating data (and the attendant cross-examination and exchange of rebuttal evidence). Only in the cases where the situation under consideration has changed radically would such a course of action be justified."

Generally speaking, the less interested Congress has been in what has been called "security of certificate," the wider the scope of reconsideration Congress has allowed to the supervising agency. See generally Davis, *Res Judicata in Administrative Law*, 25 Texas L. Rev. 199. It cannot be doubted that Congress was powerfully inter-

respect, the Federal Aviation Act is no exception since, in § 401 (f) and (g) of the Act, Congress has stated the limits of the Board's power to reconsider in unequivocal terms. Section 401 (f) provides that "Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided." The phrase "as hereinafter provided" refers to § 401 (g), which states:

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

"(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate."
(Emphasis added.)

This language represents to us an attempt by Congress to give the Board comprehensive instructions to meet all

ested in "security of certificate"/when it passed the Aviation Act.
See 83 Cong. Rec. 6407.

contingencies and the Board's duty is to follow these instructions,⁷ particularly in light of the fact that obedience thereto raises no substantial obstacles. It is true, of course, that statutory language necessarily derives much of its meaning from the surrounding circumstances. However, we think that, while there is no legislative history directly on point, the background of the Aviation Act strongly supports what we believe to be the plain meaning of § 401 (f) and (g). It is clear from the statements of the supporters of the predecessor of the Aviation Act—the Civil Aeronautics Act—that Congress was vitally concerned with what has been called “security of route”—i. e., providing assurance to the carrier that its *investment in operations* would be protected insofar as reasonably possible.⁸ And there is no other explanation

⁷ No one contends that the changes made upon reconsideration constituted the correction of inadvertent errors. See *American Trucking Assn., Inc., v. Frisco Transportation Co.*, 358 U. S. 133.

⁸ Speaking on behalf of the bill which became the predecessor of the Federal Aviation Act—the Civil Aeronautics Act of 1938—Congressman Lea said:

“One hundred and twenty million dollars has already been invested in commercial aviation in the United States. It is the information of the committee that \$60,000,000 of this sum has been wiped out. The fact that so much money has been put into commercial aviation shows the faith, the genius, and the courage of the American people in that they are willing to invest as they have in aviation up to this date. However, in the absence of legislation such as we have now before us these lines are going to find it very difficult if not impossible to finance their operations because of the lack of stability and assurance in their operations. You would not want to invest \$200 or \$2,000 a mile in a line that has no assurance of security of its route and no protection against cutthroat competition.

“Part of the proposal here is that the regulatory body created by the bill will have authority to issue certificates of convenience and necessity to the operators. This will give assurance of security of route. The authority will also exercise rate control, requiring that rates be reasonable and giving power to protect against cutthroat

but that Congress delimited the Board's power to reconsider its awards with precisely this factor in mind; hence the language that a certificate "*shall be effective . . . until suspended or revoked as hereinafter provided,*" language which is absent from several of the Acts to which reference has been made. Thus, the structure of the statute, when considered in light of the factor persuading Congress, indicates to us that the critical date in the mind of Congress was the date on which the carrier commenced operations, with the concomitant investment in facilities and personnel, not the date that abstract legal analysis might indicate as the "final" date. In other words, it seems clear to us that Congress was relatively indifferent to the fluctuations an award might undergo prior to the time it affected practical relationships, but that Congress was vitally concerned with its security after the wheels had been set in motion. In light of this, we think the result we reach follows naturally: to the extent there are uncertainties over the Board's power to alter effective certificates, there is an identifiable congressional intent that these uncertainties be resolved in favor of the certificated carrier and that the specific instructions set out in the statute should not be modified by resort to such generalities as "administrative flexibility" and "implied powers." We do not quarrel with those who would grant the Board great discretion to conjure with certificates prior to effectuation. But, we feel that we would be paying less than adequate deference to the intent of Congress were

competition. In my judgment, those two things are the fundamental and essential needs of aviation at this time, security and stability in the route and protection against cutthroat competition.

"These are the two economic fundamentals presented and it is this necessity that the bill seeks to meet. We want to give financial stability to these companies so they can finance their operations and finance them to advantage." 83 Cong. Rec. 6406-6407.

we not to hold that, after a certificate has gone into effect, the instructions set out in the statute are to be followed scrupulously.

However, petitioners argue that there is an implied exception to the statutory mandate when the Board, pursuant to a petition for reconsideration filed before the certificate's effective date, makes a statement that the certificate is subject to later amendment after further deliberation upon the petition. Petitioners admit that there is no express statutory authority for the Board to entertain petitions for reconsideration even prior to the effective date of the certificate, but they assert, and we assume *arguendo* they are correct, that the Board has implied power to accept such petitions. This being the case, petitioners claim that the existence of an outstanding petition for reconsideration gives a double meaning to the term "effective" as used in the Act: certificates are "effective" on the date specified therein for the purpose of allowing the certificated carrier to commence operations, but they are not "effective" as the term is used in § 401 (f) so as to preclude modification outside the procedures specified in § 401 (g).

The appeal of this argument comes, in the main, from the general notion that an administrative order is not "final," *for the purposes of judicial review*, until outstanding petitions for reconsideration have been disposed of. See, *e. g.*, *Outland v. Civil Aeronautics Board*, 284 F. 2d 224; *Braniff Airways, Inc., v. Civil Aeronautics Board*, 147 F. 2d 152. Once it is established that the certificate is not "final" for one purpose, the argument runs, then it is logical to assume that the certificate lacks "finality" for another. The difficulties with this line of reasoning, however, are many. First, insofar as it is bottomed on cases such as *Outland* and *Braniff*, the argument relies on holdings that were never made. The Courts of Appeals in these cases decided only that petitions for review were

timely if filed in time from the date on which the Board disposed of pending petitions for reconsideration; the question whether the Board's action on the petitions for reconsideration should have been taken after notice and hearing did not arise. Furthermore, petitioners' argument skips an important logical step; it assumes, without explanation, that questions of administrative finality present the same problems, and therefore deserve the same solutions, as questions concerning the timeliness of an appeal. In point of fact, this assertion is not only unsupported but erroneous. The pertinent statutory language is not similar in the two instances^{*} and the other points under analysis are different. Thus, a court considering the timeliness of a litigant's appeal is concerned with the wisdom of exercising its own power to act, and the result depends on such factors as fairness to the appellant and the intent of Congress in passing a general statute—§ 10 (c) of the Administrative Procedure Act—which applies equally to almost all administrative agencies. There is no call, as *Outland* and similar cases illustrate by their omissions, for considering either the sections of a particular act which are not concerned with appellate review or the problem—which at that point is of historical interest only—whether the petition for reconsideration should have been decided summarily or after notice and hearing. One might argue, of course, that the question is similar in both instances because, if the Board's action on the petition for reconsideration is too late, then an appeal which is timely only from the Board's action on reconsideration is also too late. However, this line of reasoning overlooks the confines of the result we are reaching in this case. We are not saying that the Board cannot entertain petitions for reconsideration after effec-

^{*} The "finality" of an order for purposes of judicial review depends on § 10 (c) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009 (c). See 6 Stan. L. Rev. 531.

tive certification, nor are we holding that such petitions cannot be *denied* summarily; all we hold is that the petitions cannot be granted and the certificated carrier's operations curtailed without notice or hearing. Therefore, since the cases such as *Outland* concerned the denial of a petition for reconsideration, there is no conflict, express or implied, between those decisions and this one.¹⁰ In this connection, the statement of a leading commentator seems particularly pertinent:

"The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Cook, *The Logical and Legal Bases of the Conflict of Laws* 159.¹¹

Thirdly, were we to adopt the position urged by petitioners, we would have to hold that, in the words of a former chairman of the Board, the power to reconsider a case may be the lever for "nullifying an express provision of the Act." Ryan, *The Revocation of an Airline Cer-*

¹⁰ In addition to the reasons mentioned in the text, those cases involving orders, rather than certificates—see *Western Airlines v. Civil Aeronautics Board*, 194 F. 2d 211—are distinguishable for the reasons stated in *Seatrain*, *supra*, at 432. Similarly, the cases involving certificates under the Federal Communication Act are distinguishable for the reasons stated by Commissioner Ryan. See Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. Air L. & Comm. 377, 384-385.

¹¹ See also Hancock, *Fallacy of the Transplanted Category*, 37 Can. B. Rev. 535. One might argue, of course, that judicial review and administrative reconsideration are the same since both threaten a reversal of the prior award. However, Congress has shown no intent to preclude reconsideration, either judicial or administrative, after notice and hearing.

tificate of Public Convenience and Necessity, 15 J. Air L. & Comm. 377, 384. As Commissioner Ryan indicated, the power the Board asks for in this case seems nothing more or less than the power to do indirectly what it cannot do directly. Parenthetically, it should be noted that, for purposes of this dispute, it is difficult to draw a distinction between a petition for reconsideration filed by a party and one initiated by the Board *sua sponte*. *Sprague v. Woll*, 122 F. 2d 128. This being the case, it is all the more significant that the Court in *United States v. Seatrail Lines*, 329 U. S. 424, while overruling the Interstate Commerce Commission's contention that it had inherent power to reconsider effective certificates, paid no attention to the fact that the Commission had made the original certificate effective, subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

Although we feel that the language and background of the statute are sufficiently clear so that affirmance can rest solely on that basis, it seems appropriate, in light of petitioners' vigorous assertion that policy reasons compel their result, to discuss some of the ramifications of our decision. In the first place, it bears repetition that we are *not* deciding that the Board is barred from reconsidering its initial decision. All we hold is that, if the Board wishes to do so, it must proceed in the manner authorized by statute. Thus, for example, the Board may reconsider an effective certificate at any time if it affords the certificated carrier notice and hearing prior to decision; or, if it feels uncertain about the decision prior to its effective date, it may postpone the effective date until all differences have been resolved; and, if neither of these procedures seem practical in a given case, the Board may issue a temporary certificate set to expire

on the date the Board prescribes for re-examination.¹² Indeed, with all these weapons at its command, it is difficult to follow the argument that the Board should be allowed to improvise on the powers granted by Congress in order to preserve administrative flexibility.

Furthermore, it would seem that any realistic appraisal of the relative hardships involved in this case cuts in favor of the respondent. To be sure, the Board may be able to act quicker under the rule it espouses and, by eliminating the necessity of a new hearing, Lake Central will be spared the expense of preparing a new record. However, were the Board correct, respondent would be subjected to the loss of valuable routes, routes it had already begun to operate after considerable initial investment, without being heard in opposition. The Board points out that respondent had notice that the Board had reserved

¹² Although the Board did not purport to issue a temporary certificate as prescribed in § 401 (d) (2), petitioners now argue that the Board's action was "equivalent" to a temporary certification. However, we do not find this proposition persuasive. As stated in the text, *supra*, we think that the Board must bow to the statutory procedure and cannot take short cuts. See note 15, *infra*. Moreover, the most natural reading of § 401 (d) (2)—which says that temporary certificates may be issued for "limited periods"—is that Congress was authorizing the Board to issue certificates running until a specified date. One reason for this construction is obvious; if a temporary certificate had unlimited duration, only subject to immediate revocation when the Board got around to considering various objections, it might play havoc with the ability of the carrier to accept advance reservations. Just such a contention was made by Delta before the Board in its petition for a stay of the Board's May 7, 1959, order on reconsideration. Delta pointed out:

"It is a fact that schedules for May and June, and timetables showing this early morning Chicago-Indianapolis-Evansville and Evansville-Indianapolis-Chicago service, have been released to the public and many reservations have been booked for these months. Furthermore, pilot bidding procedures and problems involving equipment rotation prohibit the immediate cancellation of this flight on short notice."

the right to amend the certificate. But, it is not clear what comfort respondent could take from such notice; respondent could not hedge since § 401 (f) of the Act provides that a certificated carrier may lose the right to conduct any service it does not initiate within 90 days of certification. Concededly, the fact of notice gives considerable surface appeal to petitioners' assertions; they can and do argue that respondent knew what it was getting into and should not be heard to complain when the gamble turns out unfavorably. However, it must be remembered that the problem is not presented to us in the abstract; we are dealing with it in the context of this particular statute. And, as stated above, a major purpose behind the enactment of the Aviation Act was to eliminate the element of risk from a carrier's operations. With Congress on record as affirmatively desiring to eliminate the necessity of gambling, we do not feel that the "assumption of the risk" argument carries much weight. The Board also argues that respondent "in substance" enjoyed the hearing contemplated by § 401 (g) because the matters impelling the Board to change its mind were matters that had been thrashed out during the hearings on the original certificate. However, this contention assumes a fact that we do not have before us—that a hearing would not have disclosed any further evidence or, perhaps more importantly, any post-certification events weighty enough to alter the Board's thinking.¹³

¹³ It appears clear, and the Board does not disagree, that the "hearing" specified in § 401 (g) means a "hearing" prior to decision. And, the Board does not contend that this requirement could have been satisfied by the allowance of a hearing after the decision on reconsideration was handed down. This course of action seems wise since (1) it is generally accepted on both principle and authority that a hearing after decision, although permissible in special circumstances, is not the equivalent of a predetermination hearing, see, e. g., Gelhorn and Byse, Administrative Law, 774; (2) it is not entirely clear that

In short, our conclusion is that Congress wanted certificated carriers to enjoy "security of route" so that they might invest the considerable sums required to support their operations; and, to this end, Congress provided certain minimum protections before a certificated operation could be cancelled. We do not think it too much to ask that the Board furnish these minimum protections as a matter of course, whether or not the Board in a given case might think them meaningless. It might be added that some authorities have felt strongly enough about the practical significance of these protections to suggest that their presence may be required by the Fifth Amendment. See *Seatrail Lines v. United States*, 64 F. Supp. 156, 161; *Handlon v. Town of Belleville*, 4 N. J. 99, 71 A. 2d 624; see also 63 Harv. L. Rev. 1437, 1439.

Petitioners' final argument is that their position is supported by consistent administrative construction and analogous case authority. The administrative construction argument appears less than substantial in light of the fact that, on the last and, it appears, only occasion when the present question was expressly considered, the Board said in dictum that it had "grave doubts" about proceeding in the manner followed in this case. *Kansas City-Memphis-Florida Case*, 9 C. A. B. 401; ¹⁴ cf. *Smith Bros.*,

Delta could have procured a hearing after the Board's decision. Delta sought a stay of the Board's May 7 order until after the *Great Lakes Local Service Investigation Case* was decided, presumably with a view to introducing further evidence on the present point in that case; the request for a stay was denied.

¹⁴ Since *Kansas City*, the Board has reconsidered an effective award on three occasions. *United Western, Acquisition of Air Carrier Property*, 11 C. A. B. 701; *Service to Phoenix Case*, Order E-12039 (1957); *South Central Area Local Service Case*, Order E-14219 (1959). *United Western* did not involve a certificate of public convenience and necessity and, thus, has no relevance. See note 10, *supra*. *Service to Phoenix* involved a denial of reconsideration except on one point, which might arguably be termed the correction of inad-

Revocation of Certificate, 33 M. C. C. 465. See generally Ryan, *supra*, where Commissioner Ryan went to great lengths to expose what he felt were the fallacies in the contentions now advanced by petitioners. With respect to prior cases, petitioners again are unable to cite any holdings on point. Petitioners rely heavily on *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 259 F. 2d 808, but the dispute here involved was not raised in that case. The closest analogy in *Frontier* is to the argument put forward by a party whose petition for reconsideration had been *denied*; and the Court of Appeals reported this argument and the reasons for overruling it as follows:

"[T]he order on reconsideration is a nullity because it was rendered after the petition for judicial review had been filed and after the certificates previously issued had become effective; and, if that order is a nullity, the basic order is also a nullity because it fails to cover certain points.

"We do not find the order denying reconsideration invalid because rendered after this petition was filed. No harm was done. Had the Board been of a mind to grant reconsideration, it could have so indicated and a motion to remand would have been in order."

Perhaps more favorable to petitioners is this Court's decision in *United States v. Rock Island Motor Transport Co.*, 340 U. S. 419, where it was held that the Interstate Commerce Commission could modify a motor carrier's effective certificate pursuant to a reservation in the initial order. However, two important distinctions between that case and this are apparent: (1) the Motor Carrier Act makes express provision for summary modifications

vertent error. See note 7, *supra*. *South Central* did involve the alteration of a certificated carrier's rights. As stated, the present point was not raised in any of these three cases.

after certification, 49 U. S. C. § 308, and (2) the Court in *Rock Island* was very careful to limit its holding to the particular modification made in that case. Finally, the decision which is analytically most relevant to this case, *United States v. Seatrain Lines, supra*, furnishes support for respondent, rather than petitioners. While *Seatrain* may be distinguishable on its facts,¹⁵ the Court spoke in general terms of the rule that supervising agencies desiring to change existing certificates must follow the procedures "specifically authorized" by Congress and cannot rely on their own notions of implied powers in the enabling act. In short, we do not find that prior authority clearly favors either side; however, to the extent that a broad observation is permissible, we think that both administrative and judicial feeling has been opposed to the proposition that the agencies may expand their powers of reconsideration without a solid foundation in the language of the statute. Therefore, since the language and background of the statute are against, rather than for, the Board, the judgment of the Court of Appeals must be

Affirmed.

¹⁵ The potentially distinguishing feature about *Seatrain* is that the Court's holding may rest on an alternate ground—viz.: that the Commission had no power to impose the conditions it did in the first instance. However, *Seatrain* cannot be distinguished on the grounds that the Court said "the certificate, when finally granted and the time fixed for rehearing has passed, is not subject to revocation in whole or in part except as specifically authorized" The point is that, under the Water Carrier Act, the Commission had express authority to entertain petitions for reconsideration at any time. See 49 U. S. C. § 916 (a), incorporating 59 U. S. C. § 17 (6) and (7). Therefore, it is clear that the Commission in *Seatrain* could have reached with impunity the result it wanted to reach by following the procedures set out by Congress. The force of the *Seatrain* decision is, then, that the commissions and boards must follow scrupulously the statutory procedures before they can alter existing operations and that arguments to the effect that "this is just another way of doing it" will not prevail.

SUPREME COURT OF THE UNITED STATES

Nos. 492 AND 493.—OCTOBER TERM, 1960.

Civil Aeronautics Board, Petitioner,
492 v.

Delta Air Lines, Inc.

Lake Central Airlines, Inc.,
Petitioner,

493 v.

Delta Air Lines, Inc.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1961.]

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN join, dissenting.

This is an airline route proceeding brought before the Civil Aeronautics Board. The case involves the effect upon the proceeding, and hence upon a certificate of convenience and necessity ordered to be issued therein, of a timely motion for reconsideration.

Specifically, the question presented is whether, in the light of the provisions of §§ 401 (f) and 401 (g) of the Federal Aviation Act,¹ the Board, by allowing its certifi-

¹ Section 401 (f) of the Federal Aviation Act (72 Stat. 755-756, 49 U. S. C. § 1371 (f)) provides, in relevant part, as follows:

"(f) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereafter provided, or until the Board shall certify that operation thereunder has ceased or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased"

Section 401 (g) of the Act (47 Stat. 755-756, 49 U. S. C. § 1371 (g)) provides, in relevant part, as follows:

"(g) The Board upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience

cate to become "effective," notwithstanding a timely filed and unruled motion for reconsideration, lost all power to grant the motion and accordingly to modify its order and the resulting certificate.

This case is but a facet of a multi-party, highly complex and protracted route proceeding, known as the "Great Lakes-Southeast Service Case," commenced before the Civil Aeronautics Board in May 1955. It involved, "predominantly," the "long-haul" service needs of an area extending roughly between the Great Lakes and Florida. Numerous trunkline carriers sought new or additional operating rights in that area. The Board was also confronted with a number of petitions by local carriers for authority to provide new or improved short-haul service between certain intermediate cities in that area. In an effort to keep the proceeding within manageable bounds, the Board declined to consolidate those short-haul petitions with this case, and, instead, directed the institution of a separate proceeding (*Great Lakes Local Service Investigation*) for their resolution, but it did announce that, to make sure that this separation would not deprive them of an opportunity to be heard in protection of their rights, the local service carriers would be permitted to intervene in this case.

As one of the many contending trunkline carriers, respondent, Delta Air Lines, Inc., petitioned for authority (1) to extend an existing route northwesterly to provide service from Miami to Detroit and (2) to add Indianapolis and Louisville as intermediate points on its existing Chicago-to-Miami route. Petitioner, Lake Central Airlines, Inc., a local or short-haul carrier operating a line between Chicago and Indianapolis, and also serving Louis-

and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate"

ville, intervened to object to the Delta petition unless its proposed new service to Indianapolis and Louisville be restricted to northbound flights originating, and to southbound flights terminating, at or south of Atlanta. Upon this issue, Lake Central offered evidence that it would suffer injury and damage, through diversion of its local traffic, by the proposed new Delta service unless it be so restricted.

On September 30, 1958, the Board filed its opinion and order in which, among other things, it authorized Delta to add Indianapolis and Louisville as intermediate points on its Chicago-to-Miami route, without imposing the restrictions that Lake Central had asked. Consistently with its custom, the Board stated in its order that the certificate thereby authorized to Delta would become effective on the 60th day after entry of the order (November 29).

Within the 30 days allowed by the Board's rule for the filing of a motion for reconsideration,² Lake Central filed

² Section 302.37 (a) of the Rules of Practice of the Civil Aeronautics Board, 14 CFR 302.37 (a) (1956 Rev. ed.), provides, in relevant part, as follows:

"Petition for reconsideration—(a) Time for filing. A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within thirty (30) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. . . ."

In a recent revision of its Rules, the Board has reduced the time within which a petition for reconsideration may be filed from 30 to 20 days. See 14 CFR § 302.37 (1960 Supp.).

49 U. S. C. § 1482 (a) provides that decisions of the Board shall be subject to review by the Courts of Appeals upon petition "filed within sixty days after the entry of such order," by any person having a substantial interest in the order.

with the Board on October 31, 1958, its motion for reconsideration, elaborating the grounds it had asserted, and supported with evidence, in opposition to Delta's petition. It also asked in that motion that the effective date of the Delta certificate be stayed pending decision by the Board of the motion for reconsideration.

On November 28, 1958, one day prior to the date upon which, as stated in the Board's order of September 30, the Delta certificate would become effective, the Board filed a lengthy memorandum and order in which it denied Lake Central's request (and also—with one exception not material here—the similar requests of others) for a stay of the effective date of the Delta certificate until after the Board had decided Lake Central's motion for reconsideration. In that order, the Board expressed its view that "the parties [had] not made a sufficient showing of probable legal error or abuse of discretion" to warrant the issuance of a stay, and that, in view of the approaching peak winter season, the "new services to Florida [were] immediately required."

Then, turning to the motions for reconsideration, the Board said in that order that, "because of the detailed matters raised in the petitions for reconsideration, it [would] not be possible to finally dispose of them until after November 29," but the Board promptly would "address itself to the merits of the petitions for reconsideration, and [its] order dealing with [those] matters [would] issue at a later date." It thus and otherwise made clear that its denial of the stays was not intended to be "[in any] way prejudicial to the legal rights of those parties seeking reconsideration." It concluded: "Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits."

Thereafter, on May 7, 1959, the Board granted Lake Central's petition for reconsideration and accordingly

entered its final order restricting Delta's service of Indianapolis and Louisville to northbound flights originating, and to southbound flights terminating, at or south of Atlanta; but the Board did say in that order that "if, after deciding the issues presented in [the] *Great Lakes Local Service* case, we conclude that the long-haul restrictions are not required, we will have full freedom to remove them at that time." It is this order that gives rise to the present controversy.

On Delta's appeal from that order, the United States Court of Appeals for the Second Circuit reversed. 280 F. 2d 43. It held that, notwithstanding the timely filed and unruled motion for reconsideration, "once [the Board allowed the] certificate [to] become effective," it lost all power thereafter to grant the motion and accordingly to modify its order and the resulting certificate, and that "it is only in a [separate and plenary] proceeding satisfying the requirements of Section 401 (g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions." 280 F. 2d, at 48. Because of the importance of the question involved to the proper administration of the Act, we brought the case here. 364 U. S. 917, 364 U. S. 918.

The Court now affirms that judgment. It does so upon grounds which, I am bound to say, with all respect, seem to me to be spurious and legally indefensible, as I shall endeavor to show.

Although the Federal Aviation Act does not expressly provide for motions for reconsideration by the Board of its orders, it is clear, and indeed it is agreed by the parties, that the Board has power to provide for, and to entertain, such motions, for "[t]he power to reconsider is inherent in the power to decide." *Albertson v. Federal Communications Comm'n*, 182 F. 2d 397, 399 (C. A. D. C. Cir.). See also *Braniff Airways, Inc., v. Civil Aeronautics Board*, 147 F. 2d 152 (C. A. D. C. Cir.).

Pursuant to that power, the Board adopted its Rule of Practice prescribing, in pertinent part, that "a petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within thirty (30) days after the date of service of a final order by the Board in such proceeding" It is admitted that Lake Central filed its motion for reconsideration within the 30 days allowed by that rule.

Under every relevant reported decision, save one to be later noted, a timely motion for reconsideration, being an authorized and appropriate step in the proceeding, "operate[s] to retain the Board's authority over the [original] order," *Waterman S. S. Corp. v. Civil Aeronautics Board*, 159 F. 2d 828, 829 (C. A. 5th Cir.), "reopen[s] the case," *Black River Valley Broadcasts v. McNinch*, 101 F. 2d 235, 240 (C. A. D. C. Cir.), and prevents the "proposed decision"—which, at that stage, is all it is (*Waterman case, supra*, at 828)—from becoming "final." *Outland v. Civil Aeronautics Board*, 284 F. 2d 224, 227 (C. A. D. C. Cir.). The proceeding being thus held open by the motion, and the Board having both the power and the duty to decide it, it would seem to be fundamental that the Board has power to decide it either way—including, of course, the "power to grant [it]," *Enterprise Co. v. Federal Communications Comm'n*, 231 F. 2d 708, 712 (C. A. D. C. Cir.), as it did here.

It seems necessarily true, and is well settled by the cases, that "Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied . . . [for] . . . there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary," *Outland v. Civil Aeronautics Board, supra*, at 227, and "although the [motion] did not . . . supersede or suspend the order, [it

³ See note 2.

did operate] to retain the Board's authority over the order, so that the order overruling the motion should be taken as the final . . . [order] intended by the statute to start the running of the sixty-day period for judicial review." *Waterman S. S. Corp. v. Civil Aeronautics Board*, *supra*, at 829. It necessarily follows that, if a timely motion for reconsideration is pending before the Board, its "proposed decision" (*id.*, at 828) has "not become final in the sense that it [is] no longer subject to change upon reconsideration," *Enterprise Co. v. Federal Communications Comm'n*, *supra*, at 712, and "jurisdiction over [that] order remains with the [Board] until the time for appeal has expired, and that time is tolled by an application for rehearing." (*Ibid.*) Hence, "no [final] rights accrued to [Delta] as a result of the order originally granting [its] permit," *Black River Valley Broadcasts v. McNinch*, *supra*, at 240. See also, *e. g.*, *Braniff Airways v. Civil Aeronautics Board*, *supra*; *Albertson v. Federal Communications Comm'n*, *supra*; *Western Air Lines v. Civil Aeronautics Board*, 194 F. 2d 211 (C. A. 9th Cir.); and *Butterfield Theatres v. Federal Communications Comm'n*, 237 F. 2d 552 (C. A. D. C. Cir.).

"There is no doubt under the decisions and practice in this Court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking . . . an appeal, and that the time within which [a] proceeding to review must be initiated begins from the date of the denial of . . . the motion . . .," *Morse v. United States*, 270 U. S. 152, 153-154, and "[t]his is also true in administrative proceedings," *Black River Valley Broadcasts v. McNinch*, *supra*, at 240.*

* See *Saginaw Broadcasting Co. v. Federal Communications Comm'n*, 96 F. 2d 554, 559 (C. A. D. C. Cir.); *Southland Industries*,

The only reported decision to the contrary is *Consolidated Flowers Ship v. Civil Aeronautics Board*, 205 F. 2d 449 (C. A. 9th Cir.). It was there held that the time within which a petition for review must be filed runs from the date of the Board's decision, not from the date on which it overruled a timely motion for reconsideration; and, inasmuch as the petition for review had not been filed within the former period, the court dismissed the petition as untimely. Recognizing that this result was contrary to its prior decisions,⁸ the court thought it was required to so hold because of the last sentence of § 10 (c) of the Administrative Procedure Act, 5 U. S. C. § 1009 (c), saying that, for the purposes of appeal, "agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application . . . for any form of reconsideration" (Emphasis added.) The fallacy of that reasoning was completely exposed and soundly rejected in *Outland v. Civil Aeronautics Board*, *supra*.⁹

Inc., v. Federal Communications Comm'n, 99 F. 2d 117 (C. A. D. C. Cir.); *Woodmen of World Life Ins. Assn. v. Federal Communications Comm'n*, 99 F. 2d 122 (C. A. D. C. Cir.); *Red River Broadcasting Co. v. Federal Communications Comm'n*, 98 F. 2d 282 (C. A. D. C. Cir.).

⁸ See *Western Air Lines v. Civil Aeronautics Board*, 196 F. 2d 933 (C. A. 9th Cir.); *Southwest Airways Co. v. Civil Aeronautics Board*, 196 F. 2d 937; *Western Air Lines v. Civil Aeronautics Board*, 194 F. 2d 211.

⁹ In *Outland v. Civil Aeronautics Board*, *supra*, the United States Court of Appeals for the District of Columbia exposed the fallacy in, and soundly rejected the reasoning of, the *Consolidated Flowers Ship* case, *supra*, in the following language:

"The legislative history of 5 U. S. C. A. § 1009 (c) indicates that it was adopted to achieve harmony with the holding in *Levers v. Anderson*, 1945, 326 U. S. 219, 66 S. Ct. 72, 90 L. Ed. 26 to the effect that a motion for rehearing was not necessary to exhaust administrative remedies. However, while making judicial review available without a motion for rehearing, that statute did not operate to repeal the law with respect to finality. Where a motion for rehearing is in fact

There is only one reported decision, involving procedures before the Civil Aeronautics Board, that has presented the precise question we have here. It is *Frontier Airlines, Inc., v. Civil Aeronautics Board*, 259 F. 2d 808 (C. A. D. C. Cir.). There, just as here, after a Board certificate had been permitted to become "effective," the Board granted an earlier and timely filed motion for reconsideration and revised the certificate accordingly. It was contended that the revision of the order and, hence, also of the certificate, so made, was "a nullity because it was rendered . . . after the certificate . . . had become effective." (*Id.*, at 810.) That contention was there soundly rejected.

It therefore seems quite clear to me that, under historic legal procedures and all, save one, of the numerous relevant decisions, the timely filing of the motion for reconsideration—being a legally authorized step in the proceeding—kept the proceeding open and continuing;

filed there is no final action until the rehearing is denied, as we said in *Braniff Airways, Inc. v. Civil Aeronautics Board*, *supra*. Section 1009 (c) does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon. The contrary result reached by the Ninth Circuit has caused parties to file so called 'protective' petitions for judicial review while petitions for rehearing before the Board were pending. A whole train of unnecessary consequences flowed from this: the Board and other parties may be called upon to respond and oppose the motion for review; when the Board acts, the petition for judicial review must be amended to bring the petition up to date.

"We hold that when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the Board." 284 F. 2d, at

that having the power, as well as the duty, to decide that motion, the Board had power to grant it, as it did, and thus, necessarily, accordingly to revise its earlier decision—which, until then, was only “a proposed decision” (*Waterman case, supra*, at 828) and, inasmuch as the Board sustained that motion, the earlier “proposed decision” never did become the final decision in the proceeding.

Inasmuch as all of the reported cases, save the discredited *Consolidated Flowers Ship case, supra*, are against it, Delta is compelled to rely almost entirely on its claim that the “plain language” of § 401 (f) deprives the Board of power, once it has allowed a certificate to become “effective,” to revise its initial decision and the resulting certificate in pursuance of an earlier and timely filed motion for reconsideration; and that, once it has been so permitted to become “effective,” the certificate may be modified or altered only by a separate and independent plenary proceeding under § 401 (g).

The obvious defects in that argument are that (1), under § 401 (f), the “proposed decision” (*Waterman case, supra*, at 228) remained subject to revision by the Board in response to the timely filed motion for reconsideration, and (2) the argument ignores the fact that § 401 (g) applies only to proceedings to alter, amend, suspend or revoke a certificate in existence after the authorization proceeding has been fully concluded and finally ended—i. e., after all timely filed motions for reconsideration have been denied, and the time for appeal has expired without an appeal being taken or, if an appeal was taken, the Board’s decision has been finally affirmed.

Surely it cannot be doubted that, if the Board, instead of granting it, had denied the motion for reconsideration, the Court of Appeals, on judicial review, or this Court on certiorari, could reverse the Board’s decision and remand

the case to the Board with directions to grant the motion for reconsideration. It is certain that such a judgment would operate not only on the Board's decision but, as well, on its "effective" certificate. If the Board has power, when thus directed by the judgment of a reviewing court, to revise, modify or vacate its erroneous decision and its resulting certificate, even though "effective," why should the result be different if the Board, without such judicial direction, notes its error, grants the timely filed and pending motion for reconsideration, and accordingly revises its decision and the resulting certificate?

Apart from the discredited Ninth Circuit case of *Consolidated Flowers Ship v. Civil Aeronautics Board*, *supra*, Delta cites no case that involves the effect upon a Board decision of a timely filed motion for reconsideration, or of a Board-revised order made in pursuance of such a motion, or that in any way supports it. Its claim of support by *United States v. Seatrain Lines*, 329 U. S. 424; *Watson Bros. Transportation Co. v. United States*, 132 F. Supp. 905; and *Re Smith Bros. Revocation of Order*, 33 M. C. C. 465, is wholly unfounded. None of those cases involved or dealt with the question we have here. None of them involved or dealt with any question respecting the effect of a timely filed motion for reconsideration upon an administrative order. To the contrary, in each of them the administrative proceeding had long since finally ended—i. e., all timely filed motions for reconsideration had been denied, the time for judicial review had expired, and the proceeding was in all respects closed.

The only relevant statement in the *Seatrain* case, *supra*, is squarely opposed to Delta's position, namely, "The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress [i. e., in an independent plenary proceeding]." 329 U. S., at 432, 433. (Emphasis added.) Here, "the time

fixed for rehearing [had not] passed," but, instead, an appropriate motion for reconsideration had been timely filed and was pending. Surely, the Board not only had power, but also a duty, to rule on that motion and, if it found it meritorious, to sustain it, and accordingly to revise its decision and resulting certificate.

The *Watson* case, *supra*, has no relevance whatever to this one. In the *Smith* case, *supra*, the Commission was careful to point out that "... the certificate marks the end of the proceedings, just as the entry of a final judgment or decree marks the end of a court proceeding. . . ." 33 M. C. C., at 472. (Emphasis added.) It is certain that "a proposed decision" (*Waterman* case, *supra*, at 228) of a court does not, while a timely filed motion for new trial, rehearing or reconsideration is pending, end the proceeding, but it is the denial of the motion, and expiration of the time to appeal, that "marks the end of a court proceeding"; and "[t]his is also true in administrative proceedings." *Black River Valley Broadcasts v. McNinch*, *supra*, at 240.

Section 401 (f) contemplates that the Board may issue a certificate of convenience and necessity "for a limited period of time under subsection (d) (2) of [that] section." Although the Board did not expressly say, in its order of September 30, 1958, that the certificate thereby authorized to Delta would continue only "for a limited period of time," it did expressly point out in its order of November 28, 1958, denying Lake Central's motion for a stay and permitting the Delta certificate to become effective, that Lake Central's motion for reconsideration was still pending undetermined, and that it promptly would "address itself to the merits of [that] petition for reconsideration, and [that its] order dealing with [that] matter [would] issue at a later date." Hence, the Delta certificate, though thus allowed to become "effective," was, in the law's regard, as surely "issued for [the] limited period of

time" expiring with the date of the possible grant of Lake Central's motion for reconsideration, as if that limitation had been expressed in the Board's authorizing order and certificate.

Here, as in *Western Air Lines v. Civil Aeronautics Board*, 194 F. 2d, 211, 214 (C. A. 9th Cir.), Delta "acted with its eyes open and at its own risk. It was aware that the proceedings before the Board had not become final, and would not until the expiration of the period of 30 days within which petitions for reconsideration might be filed."

Surely Lake Central's timely filed motion for reconsideration kept the whole proceeding open, including the Board's order and resulting certificate, until that motion was denied. It was not denied. Instead, it was granted, as surely the Board had power to do. Therefore, the Board's originally "proposed decision" never did become the final decision in the proceeding. And when that "proposed decision" thus fell, the certificate which it authorized, and which had been permitted to become temporarily "effective," necessarily fell with it, as it was always subject to the results of that motion.

It is not to be gainsaid that the practice, sometimes, as here, followed by the Board, of permitting route certificates to become "effective" while nonfrivolous motions for rehearing or reconsideration are pending undetermined,⁷ is perilous business and only rarely, if ever, is

⁷ In many instances, the Board has permitted certificates to become effective notwithstanding a motion or motions for reconsideration were pending undetermined. And in a number of such cases, as here, the Board has granted such motions and accordingly modified the "effective" certificate. See, e. g., *North Central* case, 8 C. A. B. 208; *Cincinnati-New York Additional Service*, 8 C. A. B. 603; *United-Western, Acquisition of Air Carrier Property*, 11 C. A. B. 701; *Service to Phoenix* case, Order E-12039 (1957); *South Central Area Local Service* case, Order E-14219 (1959).

justified. But it does not follow that, once having permitted a route certificate to become "effective," the Board has lost all power to decide a pending motion for reconsideration, and, if found meritorious, to grant it, and thus itself to rectify the errors in its "proposed decision" and in the route certificate that was thereby erroneously authorized.

For these reasons, I think the Court has fallen into clear error in affirming the judgment of the court below, which, in my view, is contrary to the settled law and should be reversed.